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78-5508

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN JEROME DREW

APPELLANT

VERSUS NUMBER

STATE OF LOUISIANA

APPELLEE

PETITION FILING JURISDICTIONAL STATEMENT WITH ALTERNATIVE PETITION FOR WRIT OF CERTIORARI

NOW INTO COURT, through the undersigned counsel, comes STEVEN JEROME DREW, appellant herein, and respectfully represents:

1.

Appellant presents herewith his jurisdictional statement on appeal from the Judgment of the Supreme Court of Louisiana affirming his conviction and sentence for aggravated rape.

2.

Insofar as it may be determined that any issue raised in said jurisdictional statement is not subject to the direct, appellate jurisdiction of this Court, appellant respectfully submits same for relief under writ of certiorari.

WHEREFORE, appellant prays that the above and foregoing appeal be filed and docketed, and, alternatively, that a writ of certiorari issue herein to the Supreme Court of Louisiana.

STEVEN H. BEADLES
600 Commercial National Bank Bldg.
Shreveport, Louisiana 71101

ATTORNEY APPOINTED TO REPRESENT
INDIGENT DEFENDANT

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STATE OF LOUISIANA

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VERSUS

STEVEN JEROME DREW

APPELLANT

ON APPEAL FROM

SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT

STEVEN H. BEADLES
600 Commercial National Bank Bldg.
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ON APPEAL FROM
SUPREME COURT OF LOUISIANA

* * * * * *

JURISDICTIONAL STATEMENT

(a) THE OPINIONS BELOW

The decision of the Supreme Court of Louisiana is reported at 360 So.2d 500 (1978), and appears herein as an Appendix. No other opinions have been reported.

(b) STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i)

This is a criminal prosecution against the appellant, STEVEN JEROME DREW, a Black male citizen of the United States approximately 19 years of age. Appellant was charged in the First Judicial District Court, Caddo Parish, Louisiana, with the aggravated rape of an adult White female in violation of Louisiana Revised Statutes, §14:42 which at that time provided for the death penalty. (R. 17) ("R." citations refer to the record on appeal. "Tr." citations refer to the official transcript of testimony in the trial court.) Following the conviction, appellant was sentenced to life imprisonment at hard labor, without benefit of probation, parole or suspension. (R.20)

Appellant contended that La. R.S.14:42 is repugnant to the 5th and 14th amendments to the Constitution of the United States in that insofar as the rape of an adult female who does not struggle against her assailant is concerned, the acts proscribed thereby (and the elements thereof) are precisely the same as those necessary to constitute the crime of Forcible Rape under La. R.S.14:43.1. Defendant contended that La. R.S. 14:43.1 is not merely a lesser and included offense of La. R.S. 14:42, but is the identical crime if the rape is perpetrated upon a nonstruggling adult female. Defendant contended that the patent identity of the two statutes and the absence of jurisprudence attempting to differentiate the application thereof rendered same vague and ambiguous, failed to give warning (fair or otherwise) of the criteria necessary to convert the lesser offense into the greater, and bestowed upon the District Attorney an unfettered multiple choice in electing the statute under which the crime was to be prosecuted. The decision of the Supreme Court of Louisiana was in favor of the validity of La. R.S.14:42.

Article 799 of the Louisiana Code of Criminal Procedure provides that for offenses punishable by death or necessary imprisonment at hard labor, each party shall be granted twelve peremptory challenges. Article 798 of the Louisiana Code of Criminal Procedure provides that a prospective juror may be successfully challenged for cause if he has conscientious scruples against the death penalty and would automatically vote against imposing same regardless of the facts developed at trial. Article 905 et seq. of the Louisiana Code of Criminal Procedure provide that following conviction of a crime for which the stated penalty is death, a second hearing will be had before the same jury,

wherein said jury will consider certain factors and make a recommendation to the Court for imposition of either the death penalty or life imprisonment at hard labor, without benefit of suspension, probation or parole. Appellant contended that due to the decision of this Court in Coker v. Georgia, U.S. 97 S.Ct. , 53 L.Ed2d 982 (1977) prior to his sentencing herein, the death penalty was not available, and therefore the combined application of Articles 798, 799 and 905 et seq. of the Louisiana Code of Criminal Procedure was repugnant to the 5th, 6th and 14th amendments to the constitution of the United States in that it resulted in the State being awarded the equivalent of 20 peremptory challenges while the appellant was allowed only 12, and further in that said application materially affected the manner in which defendant exercised his peremptory challenges. The Supreme Court of Louisiana ruled in favor of the application and validity of said Articles.

Article 798 of the Louisiana Code of Criminal Procedure provides that the State may successfully challenge a prospective juror for cause in a capital case if he makes it unquestionably clear that he would automatically vote against the death penalty regardless of the facts developed at trial. Article 786 of the Louisiana Code of Criminal Procedure provides that the defendant shall have the right to examine prospective jurors, but the scope of the examination is to be within the discretion of the Court. During voir dire, when a juror expressed some conscientious scruples against the death penalty, the court would not permit appellant to pose hypothetical questions to the prospective juror to see if there were not some set of facts which would lead him to vote to impose the death penalty. Defendant contended that Articles 786 and 798 were invalid as applied herein because they were repugnant to the 5th

and 14th amendments to the Constitution of the United States. The Supreme Court of Louisiana ruled in favor of the validity of said Articles.

The appellant likewise presents the following matters as the basis for invoking the appellate jurisdiction of this Court herein, or, alternatively, together with the grounds stated above, seeking a writ of certiorari herein. The trial court refused to excuse certain witnesses for cause based upon their failure to unequivocably confirm that racial prejudices would have no part in their decision. The trial court refused to permit one of appellant's key witnesses to testify as to his attempts to take a lie detector test to substantiate his testimony. The trial court permitted a devastating "in court" identification of the appellant which was concededly based upon an out of court lineup, and did not require the State to prove on the record that such lineup was not impermissibly suggestive. The trial court permitted the introduction of evidence which was obtained directly or as a direct result of an unreasonable, warrantless search and seizure of an automobile in the custody of the police. The trial court permitted the State to exercise its peremptory challenges in such a manner as to systematically exclude all prospective black jurors from the final jury. The trial court supplemented its petit jury venire by directing the Sheriff to go out into the streets and indiscriminately serve any resident he could find with a jury subpoena, and, after excusing those prospective jurors unqualified under the law, said procedure resulted in an all white jury venire. The trial court permitted a devastating in court identification of the appellant by the alleged victim when the appellant was the only black male under 50 years of age in the courtroom. The appellant contended that each of the actions were

invalid and repugnant to the 5th, 6th and 14th amendments to the Constitution of the United States. The Supreme Court of Louisiana ruled in favor of such actions.

(ii)

The judgment and decree sought to be reviewed herein is the ruling of the Supreme Court of the State of Louisiana affirming the conviction and sentence of the appellant. The original opinion was rendered on May 22, 1978, and, following appellant's timely petition for rehearing, became final with the denial of appellant's petition for rehearing on July 3, 1978. Appellant filed his Notice of Appeal in the First Judicial District Court, Caddo Parish, Louisiana, and the Supreme Court of Louisiana on September 27, 1978.

(iii)

Jurisdiction of this appeal is conferred on this Court by Title 28 of the United States Code, §1257, and in particular, §1257(2). Jurisdiction is additionally asserted under Title 28, United States Code, §1257(3).

(iv)

Cases sustaining the jurisdiction of this Court are:

Huffman v. Pursue, LTD., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

Local 333 B, United Marine Division of Intern. Longshoremen's Ass'n. (A.F.L.) v. Battle, 342 U.S. 880, 72 S.Ct. 178, 96 L.Ed. 661 (1951).

Granyed v. City of Rockford, 408 U.S. 104, 92 SCt 2294, 33 L.Ed.2d 222(1972).

The validity of the several state statutes set forth above is attacked herein as repugnant to the Constitution of the United States, and due to the length of said statutes, same are attached hereto as an Appendix. For purposes of clarification, La. R.S.14:42 and 43.1 insofar as they apply to the rape of a nonstruggling adult female, are quoted hereinbelow:

AGGRAVATED RAPE La.R.S.14:42(2)	FORCIBLE RAPE La.R.S.14:43.1
1. "Aggravated rape is a rape, heterosexual . . . where the sexual intercourse	1. "Forcible rape is sexual intercourse
2. "Is deemed to be without the lawful consent of the victim	2. "Without the lawful consent of the female . . .
3. "Where the victim is prevented from resisting the act by threats	3. "Where she is prevented from resisting the act by force or threats
4. "Of great and immediate bodily harm	4. "Of physical violence
5. "Accompanied by apparent power of execution . . .	5. "Wherein the victim reasonably believes her resistance to be useless
6. "Death."	6. "Twenty years."

The official citations of the other statutes attacked herein are as follows:

Louisiana Code of Criminal Procedure, Article 786;
Louisiana Code of Criminal Procedure, Article 798;
Louisiana Code of Criminal Procedure, Article 799;
Louisiana Code of Criminal Procedure, Article 905, et seq.

Attached hereto and made a part hereof is a copy of the opinion of the Supreme Court of Louisiana affirming the conviction and sentence of appellant, together with a copy of that court's order refusing the rehearing.

(c) QUESTIONS PRESENTED BY THE APPEAL

The following questions are presented by this appeal:

Do two state statutes defining a criminal offense in identical terms, proscribing identical actions, and consisting of identical elements (one providing for the death penalty but the other providing for a maximum penalty of twenty years at hard labor) and prosecutions under the more severe of the two violate the 5th, 6th and 14th amendments of the United States Constitution?

Does a state statute permitting a juror to be challenged for cause in a death penalty case based upon conscientious scruples violate the 5th, 6th and 14th amendments to the United States Constitution when applied in a nondeath penalty case so as to increase the peremptory challenges allowed to the State beyond the maximum provided by law?

Do State statutes permitting challenges of prospective jurors for cause based upon conscientious scruples against the death penalty violate the 5th, 6th and 14th amendments to the United States Constitution when applied in a criminal prosecution for aggravated rape of an adult female, wherein the conviction was obtained but sentence was not imposed prior to the decision of this Court in Coker v. Georgia, supra?

Do State statutes permitting a defendant to question prospective jurors on voir dire examination subject to the trial court's discretion violate the 5th, 6th and 14th amendments to the United States Constitution, as applied by the trial court, when such statutes permit a challenge for cause only when the prospective juror makes it clear that he would automatically vote against the death penalty regardless of facts established at trial, but the trial court prohibits the defendant from posing hypothethical questions on voir dire to determine whether there is any set of facts which might lead the juror to vote for the death penalty?

Does it violate the 5th, 6th and 14th amendments of the United States Constitution for a trial court to permit an "in court" identification of a defendant which is admittedly based upon an out of court lineup without requiring the State to first prove for the record that such lineup was not impermissibly suggestive?

Does it violate the 5th, 6th and 14th amendments to the United States Constitution for a trial court to permit an "in court" identification of a defendant wherein said defendant is the only person of his race, general age group and build located within the courtroom?

Does it violate the 4th, 5th, 6th and 14th amendments to the Constitution of the United States for a trial court to permit introduction of evidence which was seized or resulted directly from the seizure of items discovered by police during a warrantless search of a motor vehicle which was in the sole proprietary control of police officers, where there was no possibility of danger to such police officers, and where there was adequate and sufficient time to obtain a warrant for the search thereof?

Does it violate the 5th, 6th and 14th amendments to the Constitution of the United States for a trial court to supplement and expand its petit jury venire by directing Sheriff's deputies to go into the streets and subpoena citizens of the Parish to serve on said petit jury venire?

Does it violate the 5th, 6th and 14th amendments to the Constitution of the United States in a case fraught with patent racial overtones to refuse a defendant's challenge for cause of a prospective juror who would not state unequivocably

that racial prejudice would have no part in his decision?

Does it violate the 5th, 6th and 14 amendments to the Constitution of the United States for a trial court to prohibit a defendant from rehabilitating or corroborating a key witness by offering proof of said witnesses' attempt to take a lie detector test to establish the veracity of his testimony?

Does it violate the 5th, 6th and 14th amendments to the Constitution of the United States for a prosecutor to systematically exercise his peremptory challenges in such a manner as to effectively exclude all Blacks from a jury in a case that is fraught with patent racial overtones?

(d) STATEMENT OF THE FACTS OF THE CASE

As stated above, STEVEN JEROME DREW, appellant herein, is a Black citizen of the United States approximately 19 years of age. On December 9, 1976, he was indicted by a grand jury of the First Judicial District Court, Caddo Parish, Louisiana, for the crime of aggravated rape as defined by La.R.S.14:42. The chronology of facts and events leading to the status of that statute as of the time of the indictment is necessary, and is presented as follows:

	ITEM	EFFECTIVE DATE
(1)	Louisiana permits jury to qualify death sentence by verdict of guilty without capital punishment	1855
(2)	Source of present La. R.S.14:42	7-29-42
(3)	U.S. Supreme Court decision in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972)	6-29-72
(4)	La.C.Cr.P., arts. 814 and 817 amended to require mandatory death penalty by deleting responsive verdict of guilty without capital punishment	7-02-73

ITEM	EFFECTIVE DATE
(5) La.R.S.14:43.1 (forcible rape) added to law for first time and La.C.Cr.P. art. 814 amended to make forcible rape responsive verdict to aggravated rape	9-12-75
(6) U.S. Supreme Court decision in Roberts v. Louisiana, 428 U.S. 325, 49 L.Ed.2d 974, 96 S.Ct. 3001 (1976)	7-02-76
(7) U.S.Supreme Court decision in Selman v. Louisiana, 428 U.S. 906, 49 L.Ed.2d 1212, 96 S.Ct. 3214 (1976)	7-06-76
(8) La.C.Cr.P. arts 905 et seq. added to provide bifurcated trials in capital cases so that first part of trial would determine guilt or innocence, and, if guilty, second hearing would be had before same jury wherein it would consider a list of factors and recommend imposition of either the death penalty or life imprisonment	10-01-76
(9) Date of alleged offense (R. p. 26)	10-18-76
(10) Last pre-trial motions decided (R. p. 7)	3-07-77
(11) Trial on merits ends (R. p. 17)	6-09-77
(12) Last post trial motion denied (R. p. 20)	6-29-77
(13) U.S.Supreme Court decision in Coker v. Georgia U.S. 53 L.Ed. 2d 982, 97 S.Ct. (1977)	6-29-77
(14) Sentencing of defendant (R. p. 20)	7-01-77
(15) La. R.S.14:42 amended to provide that maximum penalty is life imprisonment at hard labor without benefit of suspension, probation or parole.	9-09-77

The alleged victim was an adult, White female, and there was not one scintilla of evidence adduced at trial which indicated that she physically struggled to resist the act.

As noted above, the trial court proceedings commenced but were not concluded prior to the decision of this Court in Coker, supra. Prior to the trial, appellant had urged the unconstitutionality of La. R.S. 14:42 in a written motion to quash the indictment, which motion was denied. (R. 7). The grounds upon which the statute was attacked included inter alia, the vagueness created by its unavoidable conflict with the forcible rape statute and that death was a cruel and unusual punishment.

After denying the motion to quash, the trial was commenced as a true capital case, wherein the Court stated that the death penalty was available. (Tr. Vol. I, 17). At the voir dire examination the State successfully challenged nine prospective jurors who claimed that they had conscientious scruples against capital punishment. (Tr. Vol II, 35, 36, 47, 48, 76, 77, 94, 120, 137, 138, 149. Tr. Vol. III, 113, 44, 47). The State additionally exercised 11 of its 12 designated peremptory challenges (Tr. Vol. I, 40, 66, 99. Tr. Vol. II, 86, 108, 163. Tr. Vol. III, 80. Tr. Vol. IV, 87). Appellant began at the outset of voir dire to determine the extent of such conscientious scruples by asking one of the first jurors to be examined whether there was any conceivable set of circumstances under which he would impose the death penalty in a rape case, such as whether a life had been taken. (Tr. Vol, II, 14). Following argument, the Court advised defendant to refrain from again posing any sort of hypothetical situations of the nature presented to that prospective juror. Appellant objected to each "death penalty" cause challenge but was overruled.

The trial was concluded on June 9, 1977 when the jury convicted the appellant and recommended under La.C.Cr.P.

arts. 905 et seq. that he be sentenced to life imprisonment without benefit of suspension, probation or parole. (R. 17). Prior to sentencing, appellant again raised the issue of unconstitutionality of La. R.S.14:42 in his motion for a new trial and motion in arrest of judgment, both of which were denied by the Court on June 29, 1977. (R. 20). That same day, this Court announced its decision in Coker, supra. The proceedings of this case in the trial court were not concluded until two days later when the appellant was sentenced to life imprisonment and he immediately entered an appeal to the Supreme Court of the State of Louisiana. (R.20).

In his specification of errors timely filed in the State Supreme Court, appellant again urged the unconstitutionality of La. R.S.14:42 on the grounds stated above, as well as the other objections discussed. (R. 85-92).

In that Court, appellant expanded his constitutional attack to include the invalidity of La. C.Cr.P. arts. 786 (scope of voir dire), 798 (challenges for cause), 799 (limit of State's peremptory challenges) and 905 et seq. (bifrucated capital case trials) as applied in this case, based upon the new grounds created by the Coker decision. All questions were extensively briefed, orally argued and considered in the Louisiana Supreme Court.

Appellant's attack against Articles 786, 798, 799 and 905 et seq. was initially based upon the fact that the Coker opinion was rendered prior to conclusion of the proceedings in the trial court, that the effect of said opinion was therefore applicable to appellant's trial, and that it was a violation of due process to permit jurors to be challenged for cause for conscientious scruples against capital punishment in a case wherein the death penalty could not validly have been imposed at

the time of sentencing. Appellant further contended that defendant could not be constitutionally sentenced to life imprisonment under arts. 905 et seq. as those provisions provide on their face that they applied in capital cases only, and that although otherwise valid, their constitutionality in rape cases depended upon the presumed validity of the death penalty for the rape of an adult female. Appellant urged that as the gravemen for their existence in rape cases was invalid, they could not be lawfully applied in his case. The Louisiana Supreme Court ruled in favor of the validity of all challenged statutes, as applied, and affirmed appellant's conviction and sentence.

The following facts are stated in support of the additional constitutional questions raised herein. At the trial, the alleged victim was asked whether she could identify one of her assailants in the courtroom, before the jury. At that time, the only young, Black male in the courtroom was Mr. Drew, who was also the only Black seated at the counsel table. (Tr. Vol. V,41). Over appellant's objection, Mrs. Sibley was permitted to point him out as the criminal. However, on cross examination, the alleged victim conceded that she never had a "good look" at the appellant until she saw him in a lineup at the police station. (Tr. Vol. V, 65). The State offered not one scintilla of evidence to establish that the lineup upon which the out of court identification was based was not "impermissibly suggestive" and made in accordance with the applicable jurisprudence of this Court. Appellant objected to the identification at the trial and again raised the issue in the Louisiana Supreme Court in his specification of errors. (R. 89). Both the trial court and the Louisiana Supreme Court ruled in favor of the validity of the identification.

Prior to the trial, appellant filed a written motion to suppress any and all physical evidence directly obtained, or obtained as a result of, a search and seizure of a motor vehicle. (R.36). The testimony at trial revealed that police officers responded to a disturbance call during the night time, reported to the scene of the alleged disturbance, and discovered an abandoned automobile. One of the investigating officers reported the license number to the police office and was advised that the car had been reported stolen. Their personal observations indicated that no one was near the car and there was no testimony to indicate that they were exposed to danger of any sort. Although the automobile was entirely under their custody and control, and although there was ample time to obtain a search warrant, they chose not to do so and immediately commenced an extensive search of the automobile. (Tr. Vol. I, 19, 22, 27, 28, 35, 67). As a result of the search, the officers discovered a wallet belonging to appellant's co-defendant Ira Lee Lloyd. The police utilized that information to locate Mr. Lloyd and the appellant, arrest them, and locate many items of tangible evidence which were introduced in evidence against appellant at trial. These items included a gun, a holster, two bullets, two wash cloths and others, all of which were highly prejudicial to appellant's case and were obtained as a direct result of the unreasonable search of the vehicle. The Constitution of the State of Louisiana, Art.I,§6, specifically gives any person standing to challenge the reasonableness of a search and seizure whether it be conducted upon property owned or possessed by him or others. Appellant raised the unreasonableness of the search in said motion to suppress, but objections made at trial, and in the Louisiana Supreme Court through his specification of errors. (R. 85-92).

At the voir dire examination, at the direction of the Court, prospective jurors were examined and submitted for acceptance or rejection in groups of three. Due to the obvious potential for racial prejudice in this prosecution of a Black man for the rape of a White woman, appellant closely questioned prospective jurors concerning their personal prejudices. As the voir dire continued, appellant had exhausted all but one of his peremptory challenges. Three jurors were then tendered to appellant for acceptance, and he exercised his remaining peremptory challenge. One of the two remaining jurors frankly admitted that it was possible that race might make a difference in his decision. (Tr. Vol. IV, 35, 36). Appellant promptly challenged said juror for cause but the Court rejected same over his objection. Appellant again raised the issue in the Louisiana Supreme Court in his specification of errors. (R. 88).

During the voir dire, many prospective jurors were excused due to lack of qualifications, cause, or upon peremptory challenges. As the remaining venire diminished, the Court sent the Sheriff into the streets around the courthouse with John Doe subpoenas for jury duty with instructions to subpoena whatever citizens could be found. The resulting venire of qualified prospective jurors was all white. Appellant urged that the manner of selecting such venire was repugnant to the Constitution but was overruled by the Court. Appellant again urged the unconstitutionality of the manner of selecting said venire in the Supreme Court of Louisiana in his specification of errors. (R.88).

At the trial, appellant called his co-defendant (trials were severed) to the stand to testify. Appellant attempted to ask such co-defendant whether he had offered to take a lie detector test for the purpose of rehabilitating him and substantiating his testimony. The Court upheld the State's objection,

(e) THIS CASE PRESENTS GROUNDS FOR JURISDICTION AND SUBSTANTIAL FEDERAL QUESTIONS

In this case, appellant has continually asserted that the State statutes listed in part (v) hereof are directly repugnant to the Constitution of the United States, either patently on their face, or as applied at trial. All of these issues were considered in the Supreme Court of Louisiana, which in each case ruled in favor of the validity of the statutes. The Supreme Court of Louisiana is the highest Court of any kind in that state, and is the court of last and only resort in criminal cases. Its May 22, 1978 opinion affirming the conviction and sentence became a final judgment on July 3, 1978, when the Court rejected appellant's petition for rehearing. Clearly, this case falls squarely within the provisions of Title 28, United States Code, §1257(2) and meets all of the requirements set forth therein for invoking review of this case under the direct, appellate jurisdiction of this Court. Appellant additionally submits that the federal questions raised on this appeal are highly substantial and virtually demand plenary consideration in this Court. The stakes here are high. The entire adult life of a nineteen year old boy is at issue. The circumstances of his conviction are ludicrous. It is respectfully submitted that there can be no question, federal or otherwise, more substantial than a patently unconstitutional action taken by the State which effectively deprives a citizen from the basic right of freedom guaranteed to him in our Constitution.

In its attempts to comply with the recent flow of decisions from the Court restricting the use of the death penalty, e.g., Furman, Roberts, Selman and Coker, all supra., the Louisiana legislature has simply created an intolerable situation insofar as the crime of rape is concerned.

Status Of Rape Statutes In Louisiana Is Abominable And Appellant Finds No Opinions Of This Court Deciding The Constitutionality of Identical State Criminal Statutes

Prior to 1972, Louisiana's Criminal Statutes defining and proscribing the crime of rape were simple and easy to comprehend. One statute defined rape in general terms. La. R.S.14:41, 1942. Two other statutes defined the crimes of aggravated rape and simple rape, imposing the death penalty for the former and a maximum penalty of 20 years for the latter. The statutes did not overlap or conflict in any material particular. La. R.S.14:42 and 14:43, 1942. Insofar as aggravated rape was concerned, the law provided that a jury could recommend against the death penalty by returning a verdict of "guilty without capital punishment." (La.C.Cr.P. arts. 814 and 817, 1966.)

With the decision of this Court in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Louisiana legislature began a process of amendment and addition to the law which has lead to the present and intolerable situation. Obviously realizing that Furman had resulted in the unconstitutionality of the provisions of arts. 814 and 817 which permitted a jury unguided discretion to impose the death penalty, the legislature deleted those mercy provisions from the law. The attempted result was that on the face of the statute, the death penalty was mandatory in aggravated rape cases, and the jury was given no discretion to avoid that result. The legislature next attempted to avoid the harsh result of its act by adding La. R.S.14:43.1 to the law defining the crime of forcible rape. La.R.S.14:43.1. There are obvious situations in which the aggravated rape statutes do not conflict or overlap with the forcible rape statute. These include instances where the victim is under the age of 12 years or, if an adult, resists the act to the utmost but is overcome by force. La. R.S.14:42(1) and (3). However, where the victim

is an adult who does not physically resist to the utmost, the only remaining provision of the aggravated rape statute under which a prosecution could be maintained is part (2) thereof, which requires that the victim be prevented from resisting by threats of great and immediate bodily harm accompanied by apparent power of execution. La. R.S.14:42(2). But the plain meaning of the words used in part (2) of the statute is precisely identical to those used in the forcible rape statute. A line by line comparison of the two statutes, insofar as applicable herein, is presented on page 6 of this document. It cannot be contested that the alleged victim in this case was an adult female. It cannot be contended that she physically resisted the act to the utmost. The sole and only basis for the conviction was part (2) of the aggravated rape statute as there is not one shread of evidence in the record to support any other conclusion.

Appellant does not suggest in this appeal that a State may not grade socially unacceptable actions and provide different penalties therefor. However, in the grading process, the State surely must be required to clearly establish when one grade of misconduct becomes a more serious offense. For example, the crimes of simple burglary and simple robbery in Louisiana are converted into the aggravated grade of those offenses if the offender arms himself with a dangerous weapon. La.R.S.14:60, 62, 64 and 65. Unauthorized use of a movable is converted to theft if the offender had specific intent to permanently deprive the victim of the property. La.R.S.14:67 and 68. In each example, some additional element of unacceptable conduct is required to convert the lesser offense into the greater. But one does not find this to be true when comparing aggravated rape under part (2) with forcible rape.

Insofar as applicable here, it is respectfully submitted that there is no guideline for the definable point at which forcible rape becomes aggravated rape. The two statutes defy

differentiation. One does not have to be studied in the law or view the social conscience of this nation from this Court's high position to see that there is virtually no difference between the two statutes. It is inconceivable to appellant how a court could explain to him or a lay juror that act which converted this alleged crime from forcible rape to aggravated rape, other than the difference in race between the alleged criminal and the alleged victim. The potential for such discrimination is obviously patent on the face of the statutes.

Appellant has been unable to find any decision of this Court construing the constitutionality of two identical state criminal statutes. Unless this high Court rights the wrong perpetrated against the defendant in this case, the State of Louisiana and other states having similar statutes will continue to be permitted a multiple choice in selecting the grade of the offense under which the prosecution will be conducted. This selection will not be based upon any provision of the law, but rather upon how an individual prosecutor perceives the situation, probably including such factors as racial differences.

The American system of criminal justice ultimately rests upon the solid pillar of the Constitution of the United States. This pillar has the Bill of Rights for its foundation. The single most important principle in this country is that no person can be deprived of his liberty without due process of law. This Court has often stated that a criminal statute which is vague, ambiguous and clearly encourages arbitrary and discriminatory enforcement simply does not meet the high test provided in the Constitution.

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined . . . if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit terms for those who apply them." Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222, 227 (1972)(emphasis added).

It is respectfully submitted that this Court must make a clear statement on the issues presented in this argument for the guidance of state legislatures, the protection of our citizens, and preservation of the rights granted to them by the Constitution.

The Louisiana Supreme Court Refused To Follow This Court's Opinion in Coker V. Georgia

In the statement of facts, it was shown that this prosecution for the aggravated rape of an adult female was prosecuted as a true capital case wherein the death penalty was available. The jury returned its verdict of guilty and recommendation for life imprisonment without suspension, probation or parole on June 9, 1977. The appellant timely filed post trial motions which were denied following oral argument on June 29, 1977. That same date, this Court announced its opinion in Coker v. Georgia, supra, banning the death penalty in cases involving the rape of an adult female. It was after that decision that the trial court proceedings were concluded by the sentencing of the defendant on June 1, 1977. Thus, at the time Coker was decided, the trial proceedings had not been completed and the procedural theory under which the case had been tried had been abolished.

In the Louisiana Supreme Court, appellant contended that the Coker decision applied to his prosecution and that it would be a violation of due process of law to apply procedural rules governing capital cases in a situation wherein the death penalty was not valid at the time of sentencing. In effect, defendant contended that he was not seeking a retroactive application of Coker, but rather a prospective application. There can be no serious question that had Coker been decided prior to the commencement of trial in this case, the trial court would not have sustained any of the state's challenges for cause based upon conscientious scruples against an inapplicable death penalty. If

State had wanted to remove such persons from the jury, it would have been required to exercise a peremptory challenge. In effect, the State was ultimately awarded 20 peremptory challenges while the defendant was limited to the 12 provided by La.C.Cr.P., Art. 799. Articles 905 et seq. would clearly have been inapplicable and no second hearing would have been required to determine whether the jury would recommend the death penalty.

It requires no citation to assert that all state courts, including the Supreme Court of Louisiana, are bound by the constitutional interpretations of this Court. As the proceedings in the state trial courts had not been concluded at the time of sentencing, it is submitted that a new trial is required in this case in order to satisfy due process of law, and that this court should not tolerate anything less.

Fair Trial Requires Jurors To Be Free From Racial Prejudice

Obviously, a Louisiana prosecution of a Black man for rape of a White woman presents a situation wherein the potential for racial prejudice is unavoidable. Regardless of the views of this writer and the Court, the fact remains that centuries of prejudice have not been completely overcome. At voir dire the appellant closely questioned each prospective juror to determine whether racial considerations would play any part in his decision. After exhausting all of his peremptory challenges, appellant was confronted with a prospective juror who frankly admitted that it was possible that the trial court refused to sustain appellant's challenge for cause and that action was upheld by the Louisiana Supreme Court. It would thus appear that it would be impossible to successfully contend that appellant had received a fair trial from an impartial jury in this case.

This Court Has Not Stated Whose Burden It is To Prove or Disprove the Propriety Of An In Court Identification Based Upon Out Of Court Lineup

In this case, a devastating "in court" identification of appellant was made by the alleged victim. She frankly conceded that she never had a "good look" of appellant until she saw him in a lineup. The record of these proceedings is void of any evidence concerning the circumstances under which the lineup was conducted.

On many occasions, this Court has noted that in court identifications based upon out of court lineups have a high potential for irrevocable damage at trial. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). Neil v. Biggers, 409 U.S. 188, 34 L.Ed.2d 401, 93 S.Ct. 375 (1972). Manson v. Brathwaite, U.S. 97 S.Ct. 53 L.Ed.2d 140 (1977). However, appellant has been unable to find any decision of this Court which determined whether it is the aggrieved defendant's duty to contest the lineup or the State's duty to prove on the face of the record that the out of court lineup was not impermissibly suggestive. Appellant respectfully submits that the effect of an in court identification is equalled in importance only by the effect of a confession. For all of the reasons which lead this court to require prosecutors to prove on the face of the record that a defendant knowingly and voluntarily waived his constitutional privilege against self incrimination, the state should likewise be required to prove on the face of the record that an out of court lineup which serves the basis for an in court identification was not made under impermissibly suggestive circumstances.

Why the Warrantless Search Of An Automobile In Complete Control of Police is Unreasonable And Prohibited By Constitution

As shown in the statement of facts, police officers in this case conducted a warrantless search of an automobile. At the time of the search, the vehicle was in the complete possession of the police and there was absolutely no reason to believe that their lives were endangered. Although there was ample time to obtain a warrant for the search, they failed to do so. Nor did they attempt to locate the owner of the vehicle to secure his permission for the search. At the time the search was conducted, there was no reason for the police to link said vehicle with the rape of the victim. Virtually all physical evidence obtained by the police thereafter was the direct result of said search.

Appellant submits that the search was unreasonable in violation of the Constitution. Although there is a wealth of jurisprudence in this Court dealing with the constitutionality of various searches, appellant is unaware of any opinion by this Court definitively stating whether the Constitution permits police officers in no apparent danger to conduct an investigative search of an abandoned vehicle without first obtaining a warrant therefor when there is no reason why such warrant could or should not be obtained.

Fourth Tallies Jury Venire Was Improperly Constituted

As the voir dire examination in this case continued, many prospective jurors were excused peremptorily for cause, or for lack of qualifications to serve as jurors. After summonsing three jury venires in accordance with its standard procedures, the Court finally sent the Sheriff into the streets surrounding the courthouse with John Doe subpoenas and orders to return with the first persons he could find who were citizens of Caddo Parish,

After said individuals responded and several were excused from the venire for lack of basic qualifications, the remaining venire failed to contain even one Black. Appellant contends that selection of a jury venire in such manner does not comply with the constitutional requirement of a fair trial before an impartial jury. Appellant is unaware of any decision of this Court authorizing selection of a jury venire in such a manner.

Conclusion

This appeal clearly raises issues of fundamental importance to our system of criminal justice. The issue of whether states can enact two identical criminal statutes providing different penalties apparently has not been directly considered in this Court and must be determined in order to protect the rights of this appellant and all other persons subjected to the abuse inherent in such statutes. Likewise, this Court should decide at what stage of trial proceedings its opinions become binding upon the court's of the states. In view of the extreme importance of these issues and the others raised herein, it is respectfully submitted that the Court should require plenary consideration herein.

Respectfully submitted,

STEVEN H. BEADLES

600 Commercial National Bank Bldg.
Shreveport, Louisiana 71101

ATTORNEY APPOINTED TO REPRESENT
INDIGENT DEFENDANT

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN JEROME DREW

APPELLANT

VERSUS NUMBER:

STATE OF LOUISIANA

APPELLEE

AFFIDAVIT IN PROOF OF SERVICE

STATE OF LOUISIANA

PARISH OF CADDO

BEFORE ME, the undersigned Notary Public, personally came and appeared STEVEN H. BEADLES, who, being duly sworn, did depose and say that he has served a copy of the above and foregoing pleading upon the State of Louisiana, being the only other party to this litigation, by depositing a true copy thereof in a United States Mail Box, with proper first class prepaid postage attached, addressed to its counsel of record, including the following, at the Post Office addresses indicated:

1. Mr. John A. Richardson, District Attorney, Caddo Parish, Louisiana, Caddo Parish Courthouse, Shreveport, Louisiana 71101;

2. Mr. Lawrence M. Johnson and Mr. Donald C. Brown, Assistant District Attorneys, Caddo Parish, Louisiana, Caddo Parish Courthouse, Shreveport, Louisiana 71101;

3. Mr. Abbott J. Reeves, Assistant District Attorney, Research and Appeals, 419 Derbigny Street, Gretna, Louisiana 70053;

4. Mr. William J. Guste, Jr., Attorney General, P. O. Box 44005, Capitol Station, Baton Rouge, Louisiana 70804;

5. Ms. Barbara A. Rutledge, Assistant Attorney General, 104 Supreme Court Building, New Orleans, Louisiana 70112.

STEVEN H. BEADLES

SWORN TO AND SUBSCRIBED Before me, the undersigned Notary Public, this 29th day of September, 1978.

NOTARY PUBLIC

APPENDIX (V)

La. R.S. 14:42 Aggravated rape

"Aggravated rape is a rape, heterosexual or homosexual, committed where the sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) Where the victim resists the act to the utmost, but whose resistance is overcome by force;

(2) Where the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution; or

(3) Where the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

Whoever commits the crime of aggravated rape shall be punished by death."

La. R.S. 43:1 Forcible rape

"Forcible rape is sexual intercourse without the lawful consent of the victim where the victim is prevented from resisting the act by force or threats of physical violence wherein the victim reasonably believes such resistance would be useless.

Whoever commits the crime of forcible rape shall be imprisoned at hard labor for not more than twenty years."

Art. 905 Capital cases; sentencing hearing required, La. C. Cr. P.

" Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein."

Added by Acts 1976, No. 694, Sec. 1.

Title of Act:

An Act to amend Title XXX of the Louisiana Code of Criminal Procedure by adding thereto a new Chapter, to be designated as Chapter 3 thereof, to be composed of Articles 905 through 905.9 thereof, both inclusive, to provide with respect to sentences and sentencing procedures in capital cases, including provisions to provide that a sentence of death may be imposed only after a sentencing hearing by the jury which determined guilt; to provide that a sentence of death shall not be imposed unless the jury finds an aggravating circumstance and considers mitigating circumstances and unanimously recommends a sentence of death; to define aggravating circumstances and mitigating circumstances; to provide that the jury recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentences if the jury unanimously finds the sentence of death inappropriate; to provide the form for jury recommendations; to require that the court sentence the defendant in accordance with the recommendation of the jury and that the court impose a sentence of life imprisonment without benefit of probation, parole, or suspension of sentence if the jury cannot unanimously agree on a recommendation; to provide for review of a sentence of death on appeal; and otherwise to provide with respect thereto." Acts 1976, No. 694.

Art. 905.1 Sentencing hearing jury; commencement, La. C. Cr. P.

" A. Except as provided in Part B herein, the sentencing hearing shall be conducted before the same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing."

Art. 905.2 Sentencing hearing; procedure and evidence, La. C. Cr. P.

"The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment." Added by Acts 1976, No. 694, Sec. 1.

Art. 905.3 Sentence of death; jury findings

"A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances." Added by Acts 1976, No. 694, Sec. 1.

Art. 905.4 Aggravating circumstances

"The following shall be considered aggravating circumstances:

(a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery;

(b) The victim was a fireman or peace officer engaged in his lawful duties;

(c) The offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping;

(d) The offender knowingly created a risk of death or great bodily harm to more than one person;

(e) The offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) The offense was committed in an especially heinous, atrocious or cruel manner."
Added by Acts 1976, No. 694, Sec 1.

Art. 905.5 Mitigating circumstances, La. C. Cr. P.

The following shall be considered mitigating circumstances:

(a) The offender has no signficant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance."

Added by Acts 1976, 694, Sec. 1.

Art. 905.6 Jury; unanimous recommendation, La. C. Cr. P.

"A sentnece of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence."

Added by Acts 1976, No. 694, Sec. 1.

Art. 905.7 Form of recommendations, La. C. Cr. P.

"The form of jury recommendation shall be as follows:

"'Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

s/_____
Foreman"

or

"'The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

s/_____
Foreman'"

Added by Acts 1976, No. 694, Sec. 1.

Art. 905.8 Imposition of sentence, La. C. Cr. P.

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to

unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence."

Added by Acts 1976, No. 694, Sec. 1.

Art. 905.9 Review on appeal, La. C. Cr. P.

"The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review."

Added by Acts 1976, No. 694, Sec. 1.

Art. 786 Examination of jurors, La. C. Cr. P.

"The court, the state, and the defendant shall have the right to examine prospective jurors. The scope of the examination shall be within the discretion of the court. A prospective juror, before being examined, shall be sworn to answer truthfully questions asked him relative to his qualifications to serve as a juror in the case."

Source: Cf. former R.S. 15:349, 15:356, 15:357; C.C.P. Arts. 1762, 1763; Fed. Rule 24(a).

"Official Revision Comment

(a) Former R.S. 15:349 required the examination of jurors in the manner provided by "existing laws," but no law on the subject was enacted.

(b) The usual practice in state courts is to allow the attorneys to examine the witness directly. This article allows the judge, as well as the attorneys, to examine the jurors. This article is partially taken from C.C.P. Arts. 1762 and 1763, which were based in part upon Fed. Rules of Civ. Proc., Rule 47(a).

(c) Rule 24(a) of the Fed. Rules of Crim. Proc. and Rule 47(a) of the Fed. Rules of Civ. Proc. provide further that if the judge decides to conduct an examination himself, he may accept suggestions from the attorneys as to further areas of examination. Such provisions are unnecessary, because the judge can always accept suggestions or allow the attorney to pursue his inquiry by direct examination.

(d) In State v. Hills, 241 La. 345, 129 So. 2d 12 (1961), the court held that wide scope of examination by counsel was necessary not only to provide an opportunity to discover grounds for challenge for cause, but also to enable the counsel to make up his mind about exercising peremptory challenges."

Cross References

Calling and examining jurors, procedure in general, see LSA-C.C.P. art. 1761.

Examination of jurors, civil cases, see LSA-C.C.P. art. 1763.

Swearing of juror before examination, see LSA-C.C.P. art. 1762.

Tendering and swearing of jurors, see arts. 788, 790.

Art. 798 Causes for challenge by the state, La. C. Cr. P.

"It is good cause for challenge on the part of the state, but not on the part of the defendant, that:

(1) The juror is biased against the enforcement of the statute charged to have been violated, or is of the fixed opinion that the statute is invalid or unconstitutional;

(2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment

without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; or

(3) The juror would not convict upon circumstantial evidence."

Amended by Acts 1968, Ex.Sess., No. 13, Sec. 1, emerg. eff. Dec. 27, 1968, at 1:00 p.m.

Source: Former R.S. 15:352.

"Official Revision Comment

This article is the same as the source provision and makes no changes in the law."

Cross References

Challenging or excusing jurors after acceptance, see LSA-C.C.P. art. 1767.

Examination of jurors, see art. 786.

General qualifications of jurors, see art. 401.

Tales jurors, see art. 785.

Art. 799 Number of peremptory challenges, La. C. Cr. P.

In trials of offenses punishable by death or necessarily by imprisonment at hard labor, each defendant shall have twelve peremptory challenges, and the state twleve for each defendant. In all other cases, each defendant shall have six peremptory challenges, and the state six for each defendant."

Source: Former R.S. 15:354.

"Official Revision Comment

(a) This article makes no change in the law.

(b) Although the court has the discretion to limit the examination of jurors on voir dire, it is an abuse of that discretion to limit the examination to such an extent

that the right of rejection by peremptory challenge cannot be exercised intelligently. The state and the defendant have the right to ask questions not only to show that there exists proper grounds for a challenge for cause, but also to elicit facts to enable them to decide whether or not to make a peremptory challenge. State v. Henry, 196 La. 217, 198 So. 910 (1940); State v. Hills, 241 La. 345, 129 So.2d 12 (1961). This right is an adjunt of the right given to the state and to the defendant to examine prospective jurors. See Comment (d) under Art. 786.

(c) For the number of peremptory challenges allowed in the case of alternate jurors see Art. 789."

Cross References

Alternate jurors, challenges, see art. 789.

LAW OFFICES OF

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SHREVEPORT, LOUISIANA 71101

SIDNEY M. COOK (1892-1)
CHARLES D. EGAN (1893-1)
CLARE C. CLARK (1879-1)

CLARENCE L. YANCEY
BENJAMIN C. KING
SIDNEY E. COOK
SIDNEY B. GALLOWAY
EDWIN L. BLEWER, JR.
JAMES ROBERT JETER
STEVEN H. BEADLES
HERSCHEL E. RICHARD, JR.
STEPHEN R. YANCEY
DEWEY W. CORLEY
F. DRAKE LEE, JR.
CHARLES G. TUTT
JOHN F. CASSIBRY
JOHN D. COLLINSWORTH

September 26, 1978

Clerk of Court
Supreme Court of Louisiana
Room 220
301 Loyola Avenue
New Orleans, Louisiana 70112

Re: No. 61,121 - State of Louisiana
v. Steven Jerome Drew

Dear Sir:

Please find enclosed herewith the original and 1 copy of the Notice of Appeal in this case indicating our appeal to the United States Supreme Court. Please accept and file this Notice in these proceedings.

In addition to the appeal we are also seeking a writ of certionari to the United States Supreme Court.

In accordance with Rule 12 of the Rules of the United States Supreme Court, we request you to certify the record herein and provide for its transmission to the United States Supreme Court, together with a descriptive list of the documents contained therein.

Thanking you, I am

Yours very truly,

STEVEN H. BEADLES

SHB:ms
Enclosures

P. S. We are enclosing an extra copy which we would appreciate your stamping and returning to us.

SHB

STATE OF LOUISIANA	:	NUMBER 61,121
VERSUS	:	SUPREME COURT
STEVEN JEROME DREW	:	STATE OF LOUISIANA

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Steven Jerome Drew, the appellant in the above entitled and numbered cause, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Louisiana dated July 3, 1978, refusing appellant a rehearing from the decision of said Court dated May 22, 1978, affirming the judgment of conviction and sentence entered herein by a jury of the First Judicial District Court in and for Caddo Parish, Louisiana, on the 9th day of June, 1977.

This appeal is taken pursuant to the provisions 28 U.S.C. 1257(2) and (3).

STEVEN H. BEADLES

600 Commercial National Bank Bldg.
Shreveport, Louisiana 71101

ATTORNEY APPOINTED TO REPRESENT
INDIGENT DEFENDANT

STATE OF LOUISIANA	:	NO. 61,121
VERSUS	:	SUPREME COURT
STEVEN JEROME DREW	:	STATE OF LOUISIANA

AFFIDAVIT IN PROOF OF SERVICE

STATE OF LOUISIANA

PARISH OF CADDO

BEFORE ME, the undersigned Notary Public, personally came and appeared STEVEN H. BEADLES, who, being duly sworn, did depose and say that he has served a copy of the above and foregoing pleading upon the State of Louisiana, being the only other party to this litigation, by depositing a true copy thereof in a United States Mail Box, with proper first class prepaid postage attached, address to its counsel of record, including the following, at the Post Office addresses indicated:

1. Mr. John A. Richardson, District Attorney, Caddo Parish, Louisiana, Caddo Parish Courthouse, Shreveport, Louisiana 71101;
2. Mr. Lawrence M. Johnson and Mr. Donald C. Brown, Assistant District Attorneys, Caddo Parish, Louisiana, Caddo Parish Courthouse, Shreveport, Louisiana 71101;
3. Mr. Abbott J. Reeves, Assistant District Attorney, Research and Appeals, 419 Derbigny Street, Gretna, Louisiana 70053;
4. Mr. William J. Guste, Jr., Attorney General, P. O. Box 44005, Capitol Station, Baton Rouge, Louisiana 70804;
5. Ms. Barbara A. Rutledge, Assistant Attorney General, 104 Supreme Court Building, New Orleans, Louisiana 70112.

STEVEN H. BEADLES

SWORN TO AND SUBSCRIBED Before me, the undersigned Notary Public, this 26th day of September, 1978.

NOTARY PUBLIC

JOHN D. COLLINSWORTH
Notary Public Caddo Parish
My Commission is for Life

FILED
SEP 27 1978
DEPUTY CLERK

STATE OF LOUISIANA : CRIMINAL DOCKET NO. 103,409
VERSUS : FIRST JUDICIAL DISTRICT COURT
STEVEN JEROME DREW : CADDO PARISH, LOUISIANA

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that STEVEN JEROME DREW, the appellant in the above entitled and numbered cause, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Louisiana dated July 3, 1978, refusing appellant a rehearing from the decision of said court dated May 2, 1978, affirming the judgment of conviction entered herein by a jury of the First Judicial District Court in and for Caddo Parish, Louisiana, on the 9th day of June, 1977.

This appeal is taken pursuant to the provisions of 28 U.S.C. 1257(2) and (3).

STEVEN H. BEADLES
600 Commercial National Bank Bldg.
Shreveport, Louisiana 71101

ATTORNEY APPOINTED TO REPRESENT INDIGENT DEFENDANT

STATE OF LOUISIANA : CRIMINAL DOCKET NO. 103,409
VERSUS : FIRST JUDICIAL DISTRICT COURT
STEVEN JEROME DREW : CADDO PARISH, LOUISIANA

AFFIDAVIT IN PROOF OF SERVICE

STATE OF LOUISIANA
PARISH OF CADDO

BEFORE ME, the undersigned Notary Public, personally came and appeared STEVEN H. BEADLES, who, being duly sworn, did depose and say that he has served a copy of the above and foregoing pleading upon the State of Louisiana, being the only other party to this litigation, by depositing a true copy thereof in a United States Mail Box, with proper first class prepaid postage attached, addressed to its counsel of record, including the following, at the Post Office addresses indicated:

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4. Mr. William J. Guste, Jr., Attorney General, P. O. Box 44005, Capitol Station, Baton Rouge, Louisiana 70804;

5. Ms. Barbara A. Rutledge, Assistant Attorney General, 104 Supreme Court Building, New Orleans, Louisiana 70112.

STEVEN H. BEADLES

SWORN TO AND SUBSCRIBED Before me, the undersigned Notary Public, this 27th day of September, 1978.

NOTARY PUBLIC

SUPREME COURT OF LOUISIANA

NO. 61,121

STATE OF LOUISIANA

V. MONDAY MAY 22 1978

STEVEN JEROME DREW

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT,
PARISH OF CADDO, STATE OF LOUISIANA
HONORABLE C. J. BOLIN, JR., JUDGE

MARCUS, Justice

Steven Jerome Drew was indicted by the grand jury for an aggravated rape allegedly committed on October 18, 1976, in violation of La. R.S. 14:42 (1975). After trial by jury, defendant was found guilty as charged. A sentencing hearing was conducted before the same jury that determined the issue of guilt; and the jury unanimously recommended a sentence of life imprisonment without benefit of probation, parole or suspension of sentence. The trial court sentenced defendant in accordance with the recommendation of the jury. On appeal, defendant relies upon fifty assignments of error for reversal of his conviction and sentence.[1]

ASSIGNMENTS OF ERROR NOS. 1 AND 49

Defendant contends the trial court erred in denying his motion to quash the indictment and motion in arrest of judgment. He argues that the statute under which he was indicted and convicted, La. R.S. 14:42 (1975), has no valid penalty provision and is unconstitutionally vague and overbroad.

---

1. Defendant has neither briefed nor argued Assignments of Error Nos. 13, 25, 31, 42, 45 and 47. Therefore, we consider these assignments of error to have been abandoned. State v. Blanton, 325 So. 2d 586 (La. 1976); State v. Carlisle, 315 So. 2d 675 (La. 1975).

La. R.S. 14:42 (1975) provided:

> Aggravated rape is a rape, heterosexual or homosexual, committed where the sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> (1) Where the victim resists the act to the utmost, but whose resistance is overcome by force;
>
> (2) Where the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution;
>
> (3) Where the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.
>
> Whoever commits the crime of aggravated rape shall be punished by death.

La. Code Crim. P. art. 905.6, one of the statutes under which defendant's sentence was determined, provides:

> A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

First, we address the issue concerning the invalidity of the penalty provision of La. R.S. 14:42 (1975). After the instant trial on the merits and sentencing hearing before the same jury that determined the issue of guilt, but prior to imposition of that sentence by the trial court, the United States Supreme Court rendered a decision in Coker v. Georgia, ____ U.S. ____, 97 S.Ct. 2861 (1977). In Coker, the Supreme Court reviewed a death sentence imposed for aggravated rape of an adult woman and "concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by

the Eighth Amendment [to the United States Constitution] as cruel and unusual punishment." (Footnote omitted.) Code Ga. §26-2001 (1972), the statute under which Coker was convicted, provides for alternative penalties to the death sentence. Coker's punishment was determined by a jury in a separate sentencing proceeding under Ga. Code Ann. §26-3102 (1976 Supp.), which is very similar to the bifurcated procedure provided under La. Code Crim. P. arts. 905, et seq., under which the instant defendant was sentenced. The Court in Coker limited its grant of certiorari only to the issue of constitutionality of the death penalty in that case, found the sentence unconstitutional, and remanded the case to the Georgia Supreme Court for further proceedings. The Georgia Supreme Court in turn remanded the case to the Georgia trial court for resentencing. Coker v. State, 239 Ga. 408, 238 S.E. 2d 690 (1977). Coker's conviction for aggravated rape was not overturned; only his death sentence was vacated.

In the instant case, defendant was not sentenced to death but contends that, under Coker, his conviction should be vacated. He argues that the nullity of the death penalty provision of La. R.S. 14:42 (1975) renders the entire statute invalid, as well as the bifurcated procedure set forth in La. Code Crim. P. arts. 905, et seq., as applied to aggravated rape cases. He argues that the articles providing for the bifurcated procedure would not have been enacted for aggravated rape cases unless the death penalty were available for such convictions. Alternatively, he argues that the proper sentence in the instant case is the sentence provided in La. R.S. 14:43 for simple rape, or, in the further alternative, the sentence provided in La. R.S. 14:27 for attempt of a crime punishable by death or life imprisonment. We find no merit to these arguments.

In Roberts v. Louisiana, 428 U.S. 325 (1976), the United States Supreme Court held unconstitutional Louisiana's mandatory death sentence for first degree murder. In accordance with that decision, this court affirmed convictions in first degree murder cases presenting no otherwise reversible error, but vacated the death sentences and remanded the cases to the trial court for resentencing of the accuseds to the most severe valid penalty established by the legislature for criminal homicide at the time of the offense. See State v. Sheppard, 350 So. 2d 615 (La. 1977); State v. Williams, 343 So. 2d 1026 (La.), cert. denied, ____ U.S. ____, 98 S.Ct. 412 (1977); State v. Jenkins, 340 So. 2d 157 (La. 1976).

In Selman v. Louisiana, 428 U.S. 906 (1976), the United States Supreme Court declared unconstitutional Louisiana's mandatory death penalty for aggravated rape. Since Selman, in cases where defendants have been convicted of aggravated rape and sentenced to death, this court under the mandate of Selman has set aside and vacated the death sentences but, finding no reversible error, has affirmed the convictions. These cases were remanded to the trial court for resentencing of defendants to the most serious penalty for a lesser included offense at the time of commission of the crime. See State v. Craig, 340 So. 2d 191 (La. 1976); State v. Lee, 340 So. 2d 180 (La. 1976); State v. Sledge, 340 So. 2d 205 (La. 1976).

However, in the instant case, La. R.S. 14:42 (1975) and La. Code Crim. P. art. 905.6 provide for alternative penalties, death or life imprisonment without benefit of probation, parole or suspension of sentence. The instant situation is thus analagous to those of many cases reviewed by this court after the United States Supreme Court decision in Furman v. Georgia, 408 U.S. 238 (1972). In Furman, the Supreme Court invalidated the death sentence provided by a Georgia statute and imposed similarly to the death penalty provided by the then effective La. R.S. 14:42 (1950). Also effective at that time was La. Code Crim. P. art. 817 (1966),

which allowed a jury in a capital case to "qualify its verdict of guilty with the addition of the words 'without capital punishment,' in which case the punishment [was to be] imprisonment at hard labor for life." Hence, the effect of these two provisions was to give the jury a choice in sentencing between death and life imprisonment, as in the instant case under La. R.S. 14:42 (1975) and La. Code Crim. P. art. 905.6. Upon review of such post-Furman cases, this court affirmed convictions presenting no otherwise reversible error and remanded the cases to the trial court for resentencing of the accuseds to life imprisonment, the alternative sentence provided by La. Code Crim. P. art. 817 (1966). See, e.g., State v. Baker, 288 So. 2d 52 (La. 1973); State v. Richmond, 284 So. 2d 317 (La. 1973); State v. Refuge, 270 So. 2d 842 (La. 1972); State v. Franklin, 263 La. 344, 268 So. 2d 249 (1972).

Under the rationale of these cases, we find that the invalidity of the death penalty provision of La. R.S. 14:42 (1975) does not render invalid that entire statute and La. Code Crim. P. arts. 905, et seq., as applied to the instant aggravated rape case. We further find that the proper sentence in the instant case is life imprisonment without benefit of probation, parole or suspension of sentence,[2] the alternate sentence provided by La. Code Crim. P. art. 905.6. Since defendant was not sentenced to death, but was in fact sentenced to life imprisonment without benefit of probation, parole or suspension of sentence, no resentencing is necessary.

We likewise find no merit to defendant's contention that La. R.S. 14:42 (1975) is unconstitutionally vague and overbroad. He argues

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2. By Act 343 of 1977, the legislature amended La. R.S. 14:42 to provide for a sentence of life imprisonment without benefit of parole, probation or suspension of sentence upon conviction for aggravated rape. Hence, the bifurcated procedure provided under La. Code Crim. P. arts. 905, et seq., is no longer applicable to aggravated rape cases.

that the law is ambiguous because there is virtually no difference between the elements of the crime of forcible rape (La. R.S. 14:43.1) and the crime of aggravated rape with which he was charged. This argument was previously rejected by this court in State v. Fletcher, 341 So. 2d 340 (La. 1976):

> [La. R.S. 14:43.1] merely created a lesser degree of the crime, permitting a responsive verdict, La. C.Cr.P. art. 814, subd. A(8) (as amended in 1975), to the charge of aggravated rape, La. R.S. 14:42. It does not, as defendant contends, repeal or make ambiguous the more serious offense of aggravated rape defined by Subsection (2) of the latter statute - punishing sexual intercourse without the lawful consent of the female since committed 'Where [she] is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.'[1] (Footnote omitted.)

We adhere to this decision.

For the reasons assigned, we find the trial court did not err in denying defendant's motion to quash the indictment and motion in arrest of judgment.

Assignments of Error Nos. 1 and 49 are without merit.

ASSIGNMENTS OF ERROR NOS. 2 AND 3

Defendant contends the trial judge erred in not requiring the state to disclose and produce all tangible items it intended to introduce in evidence, any tests made upon such items, and the results thereof in response to his motion for a bill of particulars and motion to produce.

It has been held that the defense is not entitled to pretrial discovery of descriptions of physical objects, results of tests made thereon, and the objects themselves except in certain limited exceptions not present here. State v. Thornton, 351 So. 2d 480 (La. 1977); State v. Ball, 328 So. 2d 81 (La. 1976); State v. White, 321 So. 2d 491 (La. 1975); State v. Collins, 308 So. 2d 263 (La. 1975). La. Acts 1977, No. 515, providing

for more liberal discovery in criminal cases, was not in effect at the time of filing of the motions herein and rulings thereon. Hence, this statute has no possible application here. The trial judge did not err in not compelling the state to disclose and produce the information and physical evidence requested prior to trial.

Assignments of Error Nos. 2 and 3 are without merit.

ASSIGNMENT OF ERROR NO. 4

Defendant contends the trial judge erred in denying his motion to suppress physical evidence. He argues that the evidence was recovered as a result of an unconstitutional search of an automobile and illegal arrests of one Ira Lee Loyd and defendant. Therefore, the evidence was inadmissible as "fruit of the poison tree."

At a pretrial suppression hearing, four police officers testified concerning the search of the automobile and arrests of Loyd and defendant. Their testimony reflects the following circumstances surrounding the search and arrests.

About 1:00 a.m., October 19, 1976, Officers Murphy and May in one police vehicle and Officers Lott and Foster in another received a radio broadcast concerning a complaint of a disturbance in Bossier City. The complaint had been made by an off-duty police officer, residing in the vicinity, who told the police that two black males had been causing the disturbance in connection with an automobile stuck in a ditch. Upon arrival at the scene of the disturbance, the officers found an automobile situated partially in a ditch and partially in the road; the two black males were not present. The complainant informed the officers of the direction in which the two black males had left the scene on foot. The officers ran a check of the automobile's license number and found that the license was registered for a different vehicle. They then ran a check on the vehicle

identification number and received information that the automobile had been reported stolen from Shreveport the previous day. Officers Lott and Foster then left the scene in search of the suspects, following the directions given by the complainant. Officers Murphy and May looked inside the car and saw a wallet on the rear seat. The wallet contained a social security card bearing Ira Lee Loyd's name. This information was relayed by radio to Officers Lott and Foster, who, shortly thereafter, saw two black males on foot about one-half mile from the scene of the disturbance. Officers Murphy and May joined the others. The officers asked the suspects their names; one identified himself as Ira Lee Loyd, and the other was defendant. Loyd and defendant were then advised of their Miranda rights and arrested for automobile theft. Subsequently, evidence related to the instant offense was seized from the persons of the two suspects and was found in the vicinity of their apprehension.

Defendant asserts standing to contest the search of the vehicle under La. Const. art. 1, §5. He argues that the search of the automobile was unconstitutional, requiring suppression of the wallet and social security card. He then argues that the trial court could not properly consider the inadmissible wallet and information obtained therefrom in determining probable cause to arrest Loyd and defendant; and, hence, without this information, probable cause did not exist for the arrests. Defendant further argues that no probable cause existed for the arrests even if the information obtained from the wallet may properly be considered. He thereby reasons that the physical evidence subsequently recovered as a result of the unconstitutional search and illegal arrests was inadmissible as "fruit of the poison tree."

La. Const. art. 1, §5, provides in pertinent part:

> Every person shall be secure in his person, property, communications, houses,

> papers, and effects against unreasonable searches, seizures, or invasions of privacy. (Emphasis supplied.)

Even assuming arguendo that defendant has standing to contest the search of the vehicle, there is no merit to his contention. Prior to searching the automobile, the police officers had received reliable information that the license plate on the car was registered for a different vehicle and that the car had been reported stolen. The automobile was stuck in a ditch, partially blocking the road. The officers were justified in taking possession of the vehicle and making at least a generalized search of its interior in order to secure information which might lead to the identification of the thief. The wallet was found on the rear seat of the automobile during such a search. Under the circumstances, we find that the search of the vehicle was reasonable; the trial judge properly considered the information thereby obtained in assessing probable cause to arrest Loyd and defendant.

We further find that probable cause existed for the arrests.

La. Code Crim. P. art. 215.1A provides:

> A law enforcement officer may stop any person in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or a misdemeanor and may demand of him his name, address and explanation of his actions. (Emphasis supplied.)

La. Code Crim. P. art. 215.1, as well as federal and state jurisprudence, recognizes the right of a law enforcement officer to temporarily detain and interrogate a person whom he reasonably suspects is committing, has committed or is about to commit a crime. Terry v. Ohio, 392 U.S. 1 (1968); State v. Robinson, 342 So. 2d 183 (La. 1977); State v. Perique, 340 So. 2d 1369 (La. 1976); State v. Dixon, 337 So. 2d 1165 (La. 1976); State v. Cook, 332 So. 2d 760 (La. 1976); State v. Rogers, 324 So. 2d 403 (La. 1975); State v. Jefferson, 284 So. 2d 882 (La. 1973). We have held that reasonable

cause for an investigatory detention is something less than probable cause and must be determined under the facts of each case by whether the officer had sufficient knowledge of facts and circumstances to justify an infringement on the individual's right to be free from government interference. State v. Robinson, supra; State v. Perique, supra; State v. Dixon, supra; State v. Cook, supra; State v. Weathers, 320 So. 2d 892 (La. 1975).

La. Code Crim. P. art. 213 provides in pertinent part:

> A peace officer may, without a warrant, arrest a person when:
>
> . . .
>
> (3) The peace officer has reasonable cause to believe that the person to be arrested has committed an offense, although not in the presence of the officer . . . .

Reasonable cause, which we have treated under this article as consonant with the probable cause concept, exists when the facts and circumstances known to the arresting officer and of which he has reasonably trustworthy information are sufficient to justify a man of ordinary caution in believing that the person to be arrested has committed a crime. Beck v. Ohio, 379 U.S. 89 (1964); State v. Robertson, No. 60,909 (La., April 10, 1978); State v. Williams, 349 So. 2d 286 (La. 1977); State v. Robinson, supra; State v. Marks, 337 So. 2d 1177 (La. 1976). Probable cause may be judged by the probabilities and practical considerations of everyday life on which average men, and particularly average police officers, can be expected to act. State v. Robertson, supra; State v. Williams, supra; State v. Robinson, supra; State v. Marks, supra; State v. Sarrazin, 291 So. 2d 393 (La. 1974). Compliance with these standards is in the first instance a substantive determination to be made by the trial judge from the facts and circumstances of the case. Ker v. California, 374 U.S. 23 (1963); State v. Robertson, supra; State v. Williams, supra; State v. Robinson,

supra; State v. Marks, supra; State v. Warren, 283 So. 2d 740 (La. 1973).

In the instant case, the officers were informed by the complainant that two black males had abandoned the vehicle and left the scene of the disturbance on foot. The officers knew that the license plate on the vehicle had been switched and that the vehicle was stolen. Upon seeing two black males on foot shortly thereafter in the vicinity, the officers had reasonable cause sufficient to detain the men for the purpose of asking their names. La. Code Crim. P. art. 215.1A. The officers knew that Ira Lee Loyd's wallet had been found in the stolen automobile. Once Loyd identified himself, the facts and circumstances known to the arresting officers and of which they had reasonably trustworthy information were sufficient to justify their belief that Loyd and his companion (defendant) had committed a crime (automobile theft). Hence, probable cause existed for the arrests. La. Code Crim. P. art. 213.

Having found that the search of the vehicle and the arrests were validly made, the evidence subsequently seized from the persons of Loyd and defendant and found in the vicinity of their apprehension was admissible. It was not "fruit of the poison tree." Hence, the trial judge did not err in denying defendant's motion to suppress the evidence.

Assignment of Error No. 4 is without merit.

ASSIGNMENT OF ERROR NO. 5

Defendant contends the trial court erred in admitting hearsay testimony at the suppression hearing concerning a police radio broadcast that an automobile had been reported stolen.

First, no objection was made to this testimony at the hearing. In the absence of a contemporaneous objection, an alleged irregularity or error cannot be availed of after verdict. La. Code Crim. P. art. 841; State v. Robertson, No. 60,909 (La., April 10, 1978); State v. Williams,

343 So. 2d 1026 (La.), cert. denied, ____ U.S. ____, 98 S.Ct. 412 (1977); State v. Finley, 341 So. 2d 381 (La. 1976); State v. Knight, 323 So. 2d 765 (La. 1975).

In any event, a well-settled rule is that evidence is non-hearsay which is offered not to prove the truth of the facts recited, but to prove that the utterances occurred. State v. Mitchell, No. 60,661 (La., March 6, 1978); State v. Cass, No. 60,468 (La., December 19, 1977); State v. Williams, 341 So. 2d 370 (La. 1976); State v. Monk, 315 So. 2d 727 (La. 1975); State v. White, 301 So. 2d 321 (La. 1974). In the instant case, the testimony concerning the radio broadcast that an automobile had been reported stolen was offered to show probable cause for an initial arrest of defendant for automobile theft and to prove only that such a report had been made, thereby prompting the officers to arrest defendant. It was not offered to prove the truth of the report. Hence, the trial court did not err in admitting the testimony in evidence at the pretrial suppression hearing.

Assignment of Error No. 5 is without merit.

ASSIGNMENTS OF ERROR NOS. 6 AND 7

Defendant contends the trial judge erred in sustaining the state's objection to his examination of prospective juror Hayes on voir dire concerning his opposition to the death penalty (Assignment of Error No. 6) and in restricting his voir dire examination of prospective jurors by prohibiting him from posing a certain hypothetical question (Assignment of Error No. 7).

First, the record reveals that defendant's challenge for cause of prospective juror Hayes was sustained by the trial judge. Hence, the issue raised by Assignment of Error No. 6 is moot.

Further, we find no merit to Assignment of Error No. 7. After examining prospective juror Harris on voir dire relative to his sentiments

concerning the imposition of the death penalty, the state challenged the juror for cause. Prior to ruling on the challenge by the trial judge, defendant asked the juror whether he would consider imposing the death penalty if a life were in fact taken during the aggravated rape. The juror answered in the affirmative. Defendant then objected to the state's challenge for cause. He argued that the hypothetical question assuming a life was taken during the aggravated rape was relevant for the purpose of determining whether the prospective juror could impose the death penalty under certain circumstances. The state objected to the use of the hypothetical question on the ground that no life was in fact taken in the instant case. The trial judge sustained the state's objection, which ruling is the subject of this assignment of error.

The ruling of the trial judge was correct. While defendant should be afforded wide latitude on voir dire in a capital case to explore a prospective juror's sentiments relative to the death penalty, we do not consider that it was proper for defendant to have assumed a fact (i.e., a life was taken during the aggravated rape) in his hypothetical question, which was not true in the instant case.

In any event, the hypothetical question which defendant wished to ask prospective jurors was obviously intended to aid in selecting a jury which, if it found defendant guilty of aggravated rape, would not recommend the death penalty. Since the jury actually selected did not recommend the death penalty, defendant was not prejudiced by the trial court's prohibition against the use of the hypothetical question in examining prospective jurors.

Assignments of Error Nos. 6 and 7 are without merit.

ASSIGNMENTS OF ERROR NOS. 8, 9, 10, 11, 12, 14, 15, 16, 18 AND 19

Defendant contends the trial judge erred when he sustained

the state's challenges for cause of ten prospective jurors based on their sentiments regarding the death penalty.

At the outset, we note that in Assignment of Error No. 9, defendant contends that the state challenged juror Hayes for cause. The record, however, reflects that defendant, not the state, challenged this juror for cause and that the challenge was sustained. Hence, this assignment of error is without merit.

We also find that the state's challenges for cause of the other nine jurors were properly allowed by the trial judge. La. Code Crim. P. art. 798 provides in pertinent part:

> It is good cause for challenge on the part of the state, but not on the part of the defendant, that:
>
> . . .
>
> (2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt . . . .

This article was amended to conform with the decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), wherein the United States Supreme Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." (Footnote omitted.) On the other hand, the Court found no constitutional bar to excluding jurors who stated in advance of trial that

they could not even consider returning a verdict of death or that their attitude about the death penalty would prevent them from making an impartial decision as to defendant's guilt.

After carefully examining the record on voir dire examination, we are satisfied that each of the nine jurors, after questioning by both the state and defendant, were properly excused in strict compliance with the standards set out in Witherspoon and La. Code Crim. P. art. 798(2). The responses made by these prospective jurors clearly indicated that, because of their conscientious scruples against the infliction of capital punishment, they would automatically vote against the imposition of capital punishment without regard to any evidence that might have developed in the trial on the issue of guilt, or at the sentencing hearing in the event of conviction, or that their attitudes toward the death penalty would prevent them from making an impartial decision as to defendant's guilt.

Moreover, the jury did not recommend and the trial court did not impose the death penalty. Defendant does not have a valid complaint of a Witherspoon violation. State v. James, 339 So. 2d 741 (La. 1976); State v. Rester, 309 So. 2d 321 (La. 1975); State v. Adams, 302 So. 2d 599 (La. 1974); State v. Fallon, 290 So. 2d 273 (La. 1974). Further, the death penalty provision of La. R.S. 14:42 (1975) is no longer valid. See Coker v. Georgia, ____ U.S. ____, 97 S.Ct. 2861 (1977). We have uniformly held that a defendant insulated from the death penalty has no valid Witherspoon complaint. State v. Mitchell, No. 60,661 (La., March 6, 1978); State v. Ross, 343 So. 2d 722 (La. 1977); State v. Hunter, 340 So. 2d 226 (La. 1976); State v. Miles, 339 So. 2d 735 (La. 1976).

Assignments of Error Nos. 8, 9, 10, 11, 12, 14, 15, 16, 18 and 19 are without merit.

ASSIGNMENT OF ERROR NO. 17

Defendant contends the trial judge erred in denying his motion for a mistrial made during the voir dire examination of a prospective juror who made a prejudicial remark in the presence of prospective jurors.

One of the prospective jurors was a former police officer. The state asked him if his former employment would render him incapable of being a fair and impartial juror. He replied, "Well, as far as I see, there's some doubt in my mind as to whether or not [defendant] is guilty. If he wasn't guilty, he wouldn't be up here." Defendant challenged the juror for cause and moved for a mistrial. The trial judge granted the challenge for cause, but denied the motion for a mistrial. He immediately admonished the jurors to disregard the remark.

Voir dire examination of prospective jurors is designed to discover bases for challenges for cause and to secure information for an intelligent exercise of peremptory challenges. State v. Hutto, 349 So. 2d 318 (La. 1977); State v. Ford, 349 So. 2d 300 (La. 1977); State v. Sheppard, 263 La. 379, 268 So. 2d 590 (1972). The question propounded by the state to the prospective juror in the instant case was designed to determine any potential adverse influence on his ability to render an impartial verdict. Although the prospective juror's response provided a justifiable basis for the exercise of a challenge for cause, it did not warrant the declaration of a mistrial. Mistrial is a drastic remedy to be sparingly granted and is only authorized in specified instances where unnecessary prejudice results to an accused. State v. Hutto, supra; State v. Governor, 331 So. 2d 443 (La. 1976); State v. Sylvester, 298 So. 2d 807 (La. 1974); State v. Clouatre, 262 La. 651, 264 So. 2d 595 (1972). The trial judge immediately admonished the prospective jurors to disregard the remark. No showing was made that the response of the excused juror to the state's inquiry

affected the other jurors. Nor do we find that any undue prejudice resulted therefrom. We consider that the prospective juror's response was an unsolicited answer to the state's question directed toward discovering the ability of the juror to render a fair and impartial verdict. Therefore, the trial judge did not err in denying defendant's motion for a mistrial.

Assignment of Error No. 17 is without merit.

ASSIGNMENTS OF ERROR NOS. 20 AND 21

Defendant contends the trial judge erred in denying his motion to quash the indictment and motion for a mistrial on the ground that he was denied the right to trial by a jury representing a fair cross-section of the community. He argues first that the fourth petit jury venire was improperly selected. Secondly, he argues that, after questioning on their qualifications, no blacks remained among the qualified members of the third and fourth petit jury venires.

To support a challenge made to the composition of a jury venire, the defendant must demonstrate that the state has not complied with the statutory procedures for the selection of the venire or that there has been systematic discrimination affecting a class of persons in the selection of the jury panel. State v. Taylor, 347 So. 2d 172 (La. 1977).

First we address the issue presented by defendant's contention that the fourth petit jury venire was improperly selected. In the instant case, several petit jury venires had to be called in order to select a jury panel. On the fourth day of voir dire examination, the trial judge ordered the summoning of tales jurors from among bystanders as provided in La. Code Crim. P. art. 785(D). Defendant argues that this method of selection of tales jurors was improper.

There is no merit to this contention. In State v. Monk, 315 So. 2d 727 (La. 1975), this court stated:

> . . . Article 785(D) clearly authorizes the trial judge to order the summoning of tales jurors from among the bystanders or persons in or about the courthouse 'in place of the drawing of tales jurors.' The Official Revision Comment in paragraph (e) states that, under this article, 'in parishes other than Orleans, the court has unrestricted authority to summon bystanders as tales jurors. In some sparsely populated areas of the state, the use of bystanders as jurors is preferable to summoning tales jurors who might reside at a far distance from the court.' Permitting the selection of tales jurors from among bystanders or persons in or about the courthouse is not violative of the right to an impartial jury. See State v. McGuire, 254 La. 560, 225 So. 2d 215 (1969); State v. Ferguson, 240 La. 593, 124 So. 2d 558, cert. denied, 366 U.S. 913, 81 S. Ct. 1089, 6 L. Ed. 2d 237 (1960).

Similarly, we find that this method of selection of tales jurors is not per se violative of defendant's right to trial by a jury representing a fair cross-section of the community.

We next consider the issue concerning the absence of blacks from the third and fourth petit jury venires. Defendant merely argues that all black members of these two venires were excused on the basis that they were not qualified to serve as jurors. Yet, he does not allege that they were wrongfully or systematically excluded. Defendant has failed to demonstrate the systematic exclusion of blacks from the jury venires required to challenge successfully the composition of the jury panel on such a basis. State v. Lewis, 353 So. 2d 703 (La. 1977); State v. Taylor, supra.

For the reasons assigned, the trial judge did not err in denying defendant's motion to quash the indictment and motion for a mistrial.

Assignments of Error Nos. 20 and 21 are without merit.

ASSIGNMENTS OF ERROR NOS. 22 AND 23

Defendant contends the trial judge erred in denying his challenges for cause of three prospective jurors, Messrs. Peebles, Stacks

and Braddock. He argues that the prospective jurors were not impartial. Defendant exercised a peremptory challenge against Mr. Braddock and exhausted his peremptory challenges before completion of the panel. La. Code Crim. P. art. 800.

This court has repeatedly held that the trial judge is vested with broad discretion in ruling on challenges for cause and that only where it appears, upon review of the voir dire examination as a whole, that the judge's exercise of that discretion has been arbitrary or unreasonable, resulting in prejudice to the accused, will this court reverse the ruling of the trial judge. State v. Sheppard, 350 So. 2d 615 (La. 1977); State v. Passman, 345 So. 2d 874 (La. 1977); State v. Weathers, 320 So. 2d 895 (La. 1975).

During voir dire examination, both the state and defendant extensively questioned Messrs. Peebles, Stacks and Braddock. Each of these three jurors clearly indicated that they could serve as a fair and impartial juror in the instant case. After carefully reviewing the record, we are satisfied that the testimony on voir dire of each juror, taken as a whole, does not support defendant's contention that the trial judge abused his discretion in denying defendant's challenges for cause of these three jurors.

Assignments of Error Nos. 22 and 23 are without merit.

ASSIGNMENT OF ERROR NO. 24

Defendant contends the trial judge erred in denying his motion to quash the indictment and motion for a mistrial based upon the state's use of peremptory challenges to exclude black prospective jurors allegedly in violation of his rights to due process and equal protection under the law.

The United States Supreme Court, in Swain v. Alabama, 380 U.S. 202 (1965), has held that an accused is not denied the equal

protection of the law when the state, through the use of its peremptory challenges, prevents blacks from serving on the jury unless he can prove systematic exclusion over a period of time. This court has adopted those views expressed in Swain and has refused to find a denial of equal protection unless this historical pattern of systematic exclusion is demonstrated. State v. Sheppard, 350 So. 2d 615 (La. 1977); State v. Johnson, 343 So. 2d 155 (La. 1977); State v. Bennett, 341 So. 2d 847 (La. 1976); State v. Haynes, 339 So. 2d 328 (La. 1976). Defendant has not made the requisite showing in this case. Accordingly, the trial judge did not err in denying defendant's motion to quash the indictment and motion for a mistrial predicated upon this ground.

Assignment of Error No. 24 is without merit.

ASSIGNMENTS OF ERROR NOS. 26 AND 30

Defendant contends the trial judge erred in overruling his objections to certain questions asked by the state of the rape victim. He argues that the questions were leading and that one question assumed facts not in evidence.

During the state's direct examination of the rape victim, she testified that the first rapist placed a rag over her face and that it seemed like a washcloth with a rough texture. She also stated that, after the first rapist had sexual intercourse with her, he gave her the washcloth to clean herself; then she was raped again by another man. The state showed the victim a washcloth and asked, "Would you examine that from the texture and see if that appears to be --" Defendant interrupted, objecting to the question, the first at issue, as leading. The trial judge asked the state what it intended to ask. The state replied, "If that appears to have the same texture as the cloth that was put over her face." Defendant's objection was overruled, and the state was allowed to ask the question.

The victim answered in the affirmative.

Also during the direct examination of the victim, the state asked:

> Is the man who got in your car with the gun on the North Market Street Shopping Center who drove you to an isolated dead end street on Dorian Terrace, who while holding a gun on you had sexual intercourse with you against your will and after having done so inserted the barrel of a gun --

Defendant interrupted the question, the second at issue, and objected on the grounds that it was leading and assumed facts not in evidence. The trial judge sustained the objection and instructed the state not to lead the witness or state facts not yet proven. Subsequently, the state asked the witness, "Would you tell the Jury what [the rapist] did [with the gun] please?" Defendant objected to the question, the third at issue, as leading. The objection was overruled, and the witness testified that "he spread my legs apart and shoved the gun inside of me" and "moved it back and forth."

First, we address defendant's contention that the questions were leading. It is well settled that, while counsel should not be permitted to mold testimony of a witness, a verdict should only be disturbed on that ground where there was a clear abuse calculated to prejudice the rights of the accused. State v. Sheppard, 350 So. 2d 615 (La. 1977); State v. Terregano, 336 So. 2d 859 (La. 1976); State v. Washington, 294 So. 2d 794 (La. 1974).

At the outset, we find that the third question at issue was not leading. Secondly, even if the first two questions at issue had been improper, defendant has not demonstrated wherein he was prejudiced nor that the questions were calculated to prejudice his rights. A rape victim is necessarily a very sensitive witness, and the state must sometimes

pose very embarrassing questions. It is often difficult to place evidence before the jury in such cases while adhering strictly to the rules on the form of questioning. We do not consider that the state in the instant case posed the questions at issue by design to prejudice defendant's rights nor that defendant was in fact prejudiced. Hence, the trial judge did not err in overruling defendant's objections that the questions were leading.

Also, we find to be without merit defendant's contention that the second question at issue presents reversible error because it assumed a fact not in evidence. See La. R.S. 15:278. Defendant interrupted the question before the pertinent information was stated. His objection to the question was sustained and he requested no further relief. The trial judge committed no error in handling this matter. In any event, the pertinent information was subsequently related by the rape victim herself.

Assignments of Error Nos. 26 and 30 are without merit.

ASSIGNMENT OF ERROR NO. 27

Defendant contends the trial judge erred in overruling his objection to the victim's in-court identification of defendant as her rapist on the ground that it was unduly suggestive.

During trial, the state asked the rape victim if the rapist was present in court. Defendant objected to an in-court identification on the ground that he was one of only two black men in the courtroom and was the only black man seated at counsel table. He requested an in-court lineup identification. The trial judge overruled the objection and did not allow the in-court lineup. Subsequently, the victim identified defendant as the rapist. On cross-examination, defendant questioned her extensively concerning her ability to see the rapist before, during and after the offense.

In State v. Johnson, 343 So. 2d 155 (La. 1977), this court stated:

. . . It is true that the conspicuous display of the defendant alone in the accusatorial spotlight might dispel the doubts of some uncertain witnesses. However, '. . . this circumstance does not indicate or unduly suggest to the witness that defendant committed the crime, only that he is charged with its commission.' State v. Daniels, 326 So. 2d 340, 343 (La. 1976). In Daniels, supra, and State v. Brooks, 294 So. 2d 503 (La. 1974), the court suggested that counsel's right to cross-examine and question the weight to be given identification testimony was sufficient to remedy any suggestion inherent in the in-court identification process. State v. Boettcher, 338 So. 2d 1356 (La. 1976).

State v. Boettcher, supra, and State v. Jackson, 338 So. 2d 1363 (La. 1976), held that a trial judge has the discretion to grant an accused's request for a pretrial line-up, but did not alter the rule that a defendant is not entitled to an in-court line-up. The decision whether such a protective measure is required is entrusted to the trial court's discretion:

> 'The trial court likewise has broad discretion to order protective measures other than a pretrial line-up, such as by seating the defendant elsewhere than in the normal place of an accused in the courtroom.' State v. Boettcher, 338 So. 2d 1356, 1361.

In the instant case, the fact that defendant was the only black man seated at counsel table does not render the in-court identification inadmissible, although this factor is one to be considered by the jury in weighing the testimony of the in-court identification. See State v. Daniels, 326 So. 2d 340 (La.), cert. denied, 429 U.S. 846 (1976). Defendant had ample opportunity to extensively cross-examine the victim, a sufficient remedy to any suggestion inherent in the in-court identification process. See State v. Johnson, supra; State v. Daniels, supra. Hence, the trial judge did not err in overruling defendant's objection to the in-court identification as conducted.

For the first time in brief, defendant raises a new contention, i.e., that the in-court identification was solely dependent upon a pretrial lineup identification, the validity of which was not proven at trial.[3] La. Code Crim. P. art. 841 provides that an irregularity or error cannot be availed of after verdict unless the defendant has made known to the court his objection and the grounds therefor. A new basis for an objection cannot be raised for the first time on appeal. State v. Fowlkes, 352 So. 2d 208 (La. 1977); State v. Williams, 343 So. 2d 1026 (La.), cert. denied, ____ U.S. ____, 98 S.Ct. 412 (1977); State v. Marks, 337 So. 2d 1177 (La. 1976). In any event, after review of the pertinent portion of the record, we find no merit to the new contention.

Assignment of Error No. 27 is without merit.

ASSIGNMENT OF ERROR NO. 28

Defendant contends the trial judge erred in overruling his objection to a question asked by the state of a witness on redirect examination. He argues that the subject matter was beyond the scope of cross-examination.

During trial, Charles Burton testified as a state witness. On redirect examination, the state asked him if his residence was in Caddo Parish. Defendant objected on the ground that he had not cross-examined the witness on that matter. The trial judge overruled the objection. However, the state did not repeat the question; and the witness did not answer it. The state tendered the witness for recross-examination by defendant. Defendant apparently chose not to recross-examine the witness.

We find no merit to this assigned error. In State v. Sneed, 328 So. 2d 126 (La. 1976), this court stated:

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3. Defendant's motion to suppress the pretrial lineup identification was denied after hearing. He does not assign as error the denial of this motion.

> . . . Notwithstanding the arguable contention that the redirect examination was beyond the direct and cross-examination, the application of the rule which confines redirect examination of a witness to the subject matter of the cross-examination and to the explanation of statements elicited on cross-examination is within the discretion of the trial judge. La. R.S. 15:281. Since defense counsel was not denied the opportunity to recross on the new matter alleged to have been brought out on redirect, there was no abuse of the discretion vested in the trial judge. State v. Watson, 301 So. 2d 653 (La. 1974); State v. Daniels, 262 La. 475, 263 So. 2d 859 (1972), cert. denied, 410 U.S. 944, 93 S.Ct. 1378, 35 L. Ed. 2d 610.

We find that the trial judge did not err in overruling defendant's objection to the question asked by the state to Mr. Burton on redirect examination. Moreover, Mr. Burton did not answer the question; therefore, defendant suffered no prejudice.

Assignment of Error No. 28 is without merit.

ASSIGNMENT OF ERROR NO. 29

Defendant contends the trial judge erred in overruling his objection to certain testimony of a state witness on the ground that it constituted hearsay.

During trial, Mrs. Verdell Burton testified that a little girl, about six years old, rang her door bell between 9:30 and 10:00 p.m. on the night of the alleged rape. She stated that, when her husband answered the door, the girl asked him to call the police because her mother was locked inside a car trunk and her younger brother and sister were alone on the front seat of the car. Mrs. Burton then testified that she called the police. Defendant objected to any hearsay testimony; the trial judge overruled the objection. Mrs. Burton further testified that she told the police to hurry because there was a baby in the car. On cross-examination, defendant asked Mrs. Burton if the girl had said anything more. The witness replied:

> She told us the children was there. She said, 'My mother told me to come to your house and ask for help. And this is where we saw a light.' She went on to say other things that her mother had told her to come and say.

Mrs. Burton did not elaborate; she never mentioned the rape in her testimony.

At the outset, we note that the testimony at issue did not constitute hearsay. Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. State v. King, Nos. 60,732 and 60,733 (La., March 6, 1978); C. McCormick, Evidence, §246 (Cleary ed. 1972). A well-known rule is that evidence is non-hearsay which is offered not to prove the truth of the facts recited, but to prove that the utterance occurred. State v. Mitchell, No. 60,661 (La., March 6, 1978); State v. Cass, No. 60,468 (La., December 15, 1977); State v. Williams, 341 So. 2d 370 (La. 1976); State v. Monk, 315 So. 2d 727 (La. 1975); State v. White, 301 So. 2d 321 (La. 1974). The testimony of Mrs. Burton was not hearsay because, although it related the statement of a third person, it was offered to prove that the utterance occurred, thereby prompting her to call the police, and not to prove the truth of the statement of the third person, i.e., that the child's mother was locked inside a car trunk and her younger siblings were alone in the car. Moreover, although on cross-examination defendant invited further testimony concerning the child's statements, Mrs. Burton's testimony in no way referred to the alleged rape.

In any event, even had the testimony constituted hearsay, the child's statements were admissible as part of the res gestae. Res gestae doctrine in Louisiana is broad and includes not only spontaneous

utterances and declarations made before and after commission of crime but also includes testimony of witnesses and police officers pertaining to what they heard or observed before, during, or after the commission of the crime if the continuous chain of events is evident under the circumstances. La. R.S. 15:447 and 448; State v. Batiste, 318 So. 2d 27 (La. 1975); State v. Morgan, 296 So. 2d 286 (La. 1974); State v. Edwards, 287 So. 2d 518 (La. 1973); State v. Curry, 263 La. 997, 270 So. 2d 484 (1972); State v. Sercovich, 246 La. 503, 165 So. 2d 301 (1964). Specifically, a plea for help by the witness of a crime has been held to be part of the res gestae and allowed to be related at trial by the person whose aid was sought. State v. Sneed, 328 So. 2d 126 (La. 1976). Hence, Mrs. Burton was properly allowed to testify as to the statements made by the victim's daughter when she sought aid for her mother. These statements were clearly part of the res gestae.

In sum, the trial judge did not err in overruling defendant's objection to the testimony. Assignment of Error No. 29 is without merit.

ASSIGNMENTS OF ERROR NOS. 32, 34, 35, 37, 38, 39 AND 50

Defendant contends the trial judge erred in allowing the admission of certain items of physical evidence. He argues first that some of this evidence was irrelevant and, secondly, that the state failed to lay the proper foundation for the admission of all of the items.

This court has consistently held that the trial judge is vested with wide discretion in determining the relevancy of evidence, and his ruling will not be disturbed on appeal in the absence of a clear showing of abuse of discretion. State v. King, Nos. 60,732 and 60,733 (La., March 6, 1978); State v. Russell, 352 So. 2d 1289 (La. 1977); State v. George 346 So. 2d 694 (La. 1977); State v. Owens, 301 So. 2d 591 (La. 1974); State v. Ackal, 290 So. 2d 882 (La. 1974). In the instant case, testimony at

trial linked each of the items introduced in evidence to either defendant or his co-participant in the rape. Because each was relevant to the offense, the trial judge did not err on this basis in admitting the evidence. State ex rel Clark v. Marullo, 352 So. 2d 223 (La. 1977).

Defendant's contention that the state failed to lay a proper foundation for admission of the evidence is also without merit. To admit demonstrative evidence at trial, the law requires that the object be identified. The identification can be visual, that is, by testimony at the trial that the object exhibited is the one related to the case. It can also be identified by chain of custody, that is, by establishing the custody of the object from the time it was seized to the time it was offered in evidence. State v. Robertson, No. 60,909 (La., April 10, 1978); State v. King, supra; State v. Dotson, 260 La. 471, 256 So. 2d 594 (1971), cert. denied, 409 U.S. 913 (1972). For the admission of demonstrative evidence, it suffices if the foundation laid establishes that it is more probable than not that the object is the one connected with the case. State v. Robertson, supra; State v. King, supra; State v. Williams, 341 So. 2d 370 (La. 1976); State v. Collins, 328 So. 2d 674 (La. 1976). Lack of positive identification goes to the weight of the evidence rather than to its admissibility. Ultimately, connexity is a factual matter for determination by the jury. State v. Robertson, supra; State v. King, supra; State v. Hayes, 306 So. 2d 705 (La. 1975); State v. Freeman, 306 So. 2d 703 (La. 1975); State v. Dotson, supra; State v. Wright, 254 La. 521, 225 So. 2d 201 (1969).

After reviewing the record, we find that the state laid an adequate foundation for admission of each item in evidence by showing that it was more probable than not that each item was connected with the case. Hence, the trial judge did not err in admitting the items in evidence.

Assignments of Error Nos. 32, 34, 35, 37, 38, 39 and 50 are without merit.

ASSIGNMENT OF ERROR NO. 33

Defendant contends the trial judge erred in overruling his objection to a question asked by the state of an expert witness on the ground that it was irrelevant.

During trial, Lt. William Jordan testified as an expert in the field of fingerprint identification. On cross-examination, defendant asked if he had found latent prints in a stolen car matching those of a certain man. Lt. Jordan replied in the negative. Defendant then asked, ". . . [C]ould a man drive a car like this Pontiac, for an extended period of time without wearing gloves, and fail to leave prints somewhere on the vehicle?" The witness answered in the affirmative.

Later during trial, Lt. Jimmy McEachern was accepted, without objection by defendant, as an expert in the field of fingerprint identification. On direct examination, he testified that he had examined the rape victim's automobile, allegedly driven by defendant, but found no latent prints matching those of defendant. The state then asked, "Is it possible, in your opinion, that Mr. Drew could have operated that vehicle and not left prints which could have been obtained --" Defendant objected to the question on the ground that it was irrelevant. The trial judge overruled the objection. The witness subsequently answered the question in the affirmative.

La. R.S. 15:441 provides:

> Relevant evidence is that tending to show the commission of the offense and the intent, or tending to negative the commission of the offense and the intent.
>
> Facts necessary to be known to explain a relevant fact, or which support an inference raised by such fact, are admissible.

This court has consistently held that the trial judge is vested with wide discretion in determining the relevancy of evidence, and his ruling

will not be disturbed on appeal in the absence of a clear showing of abuse of discretion. State v. King, Nos. 60,732 and 60,733 (La., March 6, 1978); State v. Russell, 352 So. 2d 1289 (La. 1977); State v. George, 346 So. 2d 694 (La. 1977); State v. Owens, 301 So. 2d 591 (La. 1974); State v. Ackal, 290 So. 2d 882 (La. 1974).

In the instant case, defendant himself had asked a similar question of another expert witness. The fact that Lt. McEachern found no latent prints in the victim's automobile matching those of defendant was a relevant fact tending to negative the commission of the offense. The question asked by the state of Lt. McEachern was necessary to explain that fact by soliciting an expert opinion that it was possible for defendant to have driven the automobile without leaving fingerprints therein. Hence, the trial judge did not err in overruling defendant's objection to the question.

Assignment of Error No. 33 is without merit.

ASSIGNMENT OF ERROR NO. 36

Defendant contends the trial judge erred in allowing the admission in evidence of certain washcloths and testimony concerning them. He argues that the washcloths were not fairly mentioned in the state's opening statement.

The state's opening statement included the following remark:

> The state will produce the gun used in the commission of this offense as well as other items of physical evidence including pictures, clothes and other related materials.

The state's evidence need not be detailed in the opening statement. The statement's primary function is to set forth in general terms the nature of the charge and of the evidence sufficiently to enable the jury to follow the proceedings and to inform the accused of what acts on his part the state intends to prove. La. Code Crim. P. arts. 766, 769; State

v. Robertson, No. 60,909 (La., April 10, 1978); State v. Sneed, 316 So. 2d 372 (La. 1975). In the instant case, the state's opening statement set forth the nature of the evidence sufficiently. Hence, the trial judge did not err in admitting in evidence the washcloths and testimony concerning them.

Assignment of Error No. 36 is without merit.

ASSIGNMENTS OF ERROR NOS. 40 AND 41

Defendant contends the trial judge erred in accepting Lt. Jordan as an expert in the field of fingerprint identification and Ms. Judy Houston as an expert in the fields of serology and microscopic examination.

We note first that the record reveals no objection to the acceptance of Lt. Jordan as an expert in his field. In the absence of a contemporaneous objection, an alleged irregularity or error in the proceeding cannot be availed of after verdict. La. Code Crim. P. art. 841; State v. Robertson, No. 60,909 (La., April 10, 1978); State v. Williams, 343 So. 2d 1026 (La.), cert. denied, ____ U.S. ____, 98 S.Ct. 412 (1977); State v. Finley, 341 So. 2d 381 (La. 1976); State v. Knight, 323 So. 2d 765 (La. 1975).

In any event, we find that both witnesses were properly qualified as experts in their respective fields. La. R.S. 15:466 sets out the guidelines for the qualification of expert witnesses:

> The test of the competency of an expert is his knowledge of the subject about which he is called upon to express an opinion, and before any witness can give evidence as an expert his competency so to testify must have been established to the satisfaction of the court.

We have consistently held that the competence of an expert witness is a question of fact to be determined within the sound discretion of the trial judge. His rulings on the qualifications of expert witnesses will not be disturbed in the absence of manifest error. State v. Lewis, 353 So. 2d 703 (La. 1977); State v. Madison, 345 So. 2d 485 (La. 1977); State v. Marks,

337 So. 2d 1177 (La. 1976); State v. Vassel, 285 So. 2d 221 (La. 1973). The record discloses that both witnesses possessed sufficient education and practical experience in their respective fields to qualify as experts therein. Moreover, both witnesses had previously qualified as experts on several occasions in district courts in Louisiana. We cannot, therefore, find that the trial judge abused his discretion in accepting these witnesses as experts in their respective fields.

Assignments of Error Nos. 40 and 41 are without merit.

ASSIGNMENT OF ERROR NO. 43

Defendant contends the trial judge erred in sustaining the state's objection to a question asked by defendant of a defense witness.

During direct examination of a defense witness, defendant asked whether he had offered to take a polygraph test. The state objected to the question. The witness nevertheless answered in the affirmative; the trial judge then sustained the objection and instructed the jury to disregard the witness' answer.

The results of polygraph tests are not admissible in evidence. State v. Weeks, 345 So. 2d 26 (La. 1977); State v. Governor, 331 So. 2d 443 (La. 1976); State v. Refuge, 270 So. 2d 842 (La. 1972). Likewise, testimony of a witness that he has taken or was willing to take a polygraph test is also inadmissible. In State v. Refuge, supra, this court stated:

> . . . Such evidence is excluded as an attempt by indirection to evade the direct prohibition against lie-detection testimony for jury consideration, based upon the incompetency and unduly prejudicial effect of such testimony in judicial proceedings.

Hence, the trial judge did not err in sustaining the state's objection to the question.

Assignment of Error No. 43 is without merit.

ASSIGNMENT OF ERROR NO. 44

Defendant contends the trial judge erred in refusing to give a requested special charge to the jury pertaining to resolution of conflicting testimony and the credibility of witnesses. Defendant's requested charge was confusing and not wholly correct. In any event, the proper law on the subject was correctly included in the trial judge's general charge to the jury. Hence, the trial judge correctly refused to give the requested special charge. La. Code Crim. P. art. 807.

Assignment of Error No. 44 is without merit.

ASSIGNMENT OF ERROR NO. 46

Defendant contends the trial judge erred in allowing the state, after trial had begun, to amend the indictment charging defendant with the instant offense by changing the date on which the indictment was filed.

After opening statements were delivered on June 4, 1977, the state moved to amend the indictment to correct a typographical error by changing the date of the filing of the indictment from December 9, 1977, to December 9, 1976. Defendant objected to the amendment; the trial judge overruled the objection, allowing the amendment.

Article 487 of the Code of Criminal Procedure states that the court may cause an indictment to be amended at any time with respect to a defect of form. Even a mistake respecting the date on which the offense occurred has been held to be such a defect of form, when not essential to the offense. State v. McCoy, 337 So. 2d 192 (La. 1976); State v. Sharp, 321 So. 2d 331 (La. 1975); State v. Hubbard, 279 So. 2d 177 (La. 1973); State v. Pickett, 261 La. 237, 259 So. 2d 307 (1972); State v. Martin, 255 La. 961, 233 So. 2d 898 (1970). The incorrectness of the date on which the indictment was filed was merely a defect of form; it was not essential

to the offense. Moreover, defendant made no motion for a recess, nor does he make a showing of surprise or prejudice resulting from the amendment. Finally, since the trial began prior to December 9, 1977, it was obvious to defendant that the indictment was not filed on that date.

Assignment of Error No. 46 is without merit.

ASSIGNMENT OF ERROR NO. 48

Defendant first contends the trial judge erred in denying his motion for a new trial based on various grounds urged in other assignments of error on appeal. For the reasons assigned, we find no merit to this contention.

Defendant also assigns as error the trial judge's denial of his motion for a new trial grounded on the claim that the verdict is contrary to the law and evidence. It is well settled that such an allegation presents nothing for this court's appellate review. State v. Cass, No. 60,468 (La., December 15, 1977); State v. Fowlkes, 352 So. 2d 208 (La. 1977); State v. Williams, 343 So. 2d 1026 (La.), cert. denied, ____ U.S. ____, 98 S.Ct. 412 (1977); State v. Jack, 332 So. 2d 464 (La. 1976). In brief to this court, defendant contends the trial judge erred in denying his motion for a new trial on the ground that there was no evidence to support his conviction. A new basis for a motion for a new trial cannot be raised for the first time on appeal. State v. Cass, supra. Nevertheless, we have reviewed the record and find substantial evidence to support defendant's conviction.

In sum, the trial judge did not err in denying defendant's motion for a new trial. Assignment of Error No. 48 is without merit.

DECREE

For the reasons assigned, the conviction and sentence are affirmed.

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

versus No. 61,121

STEVEN JEROME DREW

Concurring Opinion

TATE, Justice.

With regard to Assignments 7-19, the prospective jurors were properly excused for cause relating to their refusal to accept the instructions of the court with regard to applying the death penalty. If they had not been properly excused, contrary to statute the state would have received additional peremptory challenges. See concurring opinion in State v. Miles, 339 So.2d 735, 740 (1976). Therefore, I regard as dicta the additional reason assigned by the majority that the complaint became moot because the defendant did not in fact receive the death penalty, even though by reason of the improperly granted challenges for cause he had been deprived of the availability of jurors to which he was entitled by law.

Likewise, with regard to Assignment 29, the witness's testimony as to the little girl's request for help was admissible for the reasons stated by the majority, but I would not agree with the broad statement of the testimony's admissibility as res gestae insofar as it implies that any and all such post-crime hearsay statements by a non-participant are admissible as res gestae.

X X X

SUPREME COURT OF LOUISIANA

No. 61121

STATE OF LOUISIANA

Versus

STEVEN JEROME DREW

DIXON, Justice (concurring)

I respectfully concur, agreeing with the holding, but not the dicta, in the treatment of Assignment No. 4. As for Assignment No. 29, the child's report should not be called "res gestae."

CHIEF JUSTICE
JOE W. SANDERS
ASSOCIATE JUSTICES
FRANK W. SUMMERS
ALBERT TATE, JR.
JOHN A. DIXON, JR.
PASCAL F. CALOGERO, JR.
WALTER F. MARCUS, JR.
JAMES L. DENNIS
CLERK OF COURT
FRANS J. LABRANCHE, JR.

Supreme Court
STATE OF LOUISIANA
New Orleans

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UNITED STATES OF AMERICA

STATE OF LOUISIANA

SUPREME COURT OF THE STATE OF LOUISIANA

New Orleans, 70112

I, Andrew J. Falcon, Deputy Clerk, Supreme Court of the State of Louisiana, do hereby certify that the Court took the following action on July 3, 1978, in the matter entitled STATE OF LOUISIANA VS. STEVEN JAMES DREW NO. 61121

"REHEARING REFUSED"

IN WITNESS WHEREOF, I hereunto sign my name and affix the seal of the Court aforesaid, at the City of New Orleans, this the 26th day of September A. D., 1978.

Andrew J. Falcon

Deputy Clerk
Supreme Court of the State of Louisiana